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# **Representing Clients in Family Offense Proceedings**

**Ronald J. Bavero\***

## **I. Preliminary Overview**

Physical violence between members of the same family is a problem of epidemic proportions. Recent statistics demonstrate that an individual is more likely to be murdered by a member of his or her own family, especially a spouse, than by any other category of person. An estimated six million women are beaten by their husbands or intimate partners each year. In addition, the National Institute of Mental Health has identified battering as the leading cause of injury to women - more than automobile accidents, rapes and muggings combined. This crisis is dramatically illustrated each and every day in the news accounts of individuals who are killed by spouses, seemingly, as they clutch their orders of protection issued by the family or criminal court.

For the family law practitioner, the question often becomes how *best* to protect the client from imminent and/or future incidents of violence. For the court, the task is often reduced to making the split-second decision of whether, and to what extent, it should invoke its enormous powers. Is this a situation where the threat of violence is real and imminent or is the petitioner unfairly and inappropriately attempting to use the proceeding to gain a strategical advantage in a current or contemplated matrimonial proceeding? For the client, the question often becomes one of survival. How does one protect oneself from an angry, vindictive spouse who is threatening to inflict injury - either physical or that which results from false accusations?

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While there are no perfect answers to each of these questions, a thorough understanding of Article 8 of the Family Court Act<sup>1</sup> ("FCA"), as well as the Family Protection and Domestic Violence Intervention Act of 1994,<sup>2</sup> is an absolute prerequisite to any meaningful attempt to resolve the competing and complex issues presented.

## II. Family Protection and Domestic Violence Intervention Act of 1994

Over the course of the past fifteen years, the New York Legislature has dramatically altered its views on how best to deal with the problem of domestic violence. Prior to September 1, 1977, the family court was vested with *exclusive* original jurisdiction over family offense cases, subject only to the *limited* right to transfer certain cases to the criminal court.<sup>3</sup> This grant to the family court of virtual exclusive jurisdiction over family offenses was premised on the now discarded philosophy that domestic violence was a "social problem" which did not require a criminal response.<sup>4</sup> Indeed, the primary purpose of the FCA was to render services to keep the family unit intact.<sup>5</sup>

Effective September 1, 1977, the criminal courts of the State of New York were granted *concurrent* jurisdiction over family offense cases.<sup>6</sup> As a result of this legislative change, victims of family violence now had a "right of election". The victim could initially choose to proceed in *either* the family court or the criminal court.<sup>7</sup> In essence, the choice of whether the abusing spouse or family member would be criminally prosecuted was passed from the court to the victim. However, the victim's right of election became final three days after the filing of a petition

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1. 1962 N.Y. Laws ch. 686 (codified as amended at N.Y. FAM. CT. ACT §§ 812-47 (McKinney 1983 & Supp. 1995)).

2. 1994 N.Y. Laws ch. 222 (codified as amended in scattered sections of N.Y. FAM. CT. ACT, N.Y. DOM. REL. LAW, N.Y. CRIM. PROC. LAW, N.Y. PENAL LAW, N.Y. JUD. LAW, and N.Y. EXEC. LAW).

3. 1964 N.Y. Laws ch. 154 § 812 (repealed 1977).

4. REPORT OF JOINT LEGISLATIVE COMMITTEE ON COURT REORGANIZATION, THE FAMILY COURT ACT, 1962 McKinney's Session Law, Part II at 3444.

5. *Id.* The aim is to provide "not punishment, but practical help," and thus aid in "dealing with the underlying family difficulties . . ." *Id.*

6. 1977 N.Y. Laws ch. 449, § 812.

7. *Id.*

in the family court or an accusatory instrument in the criminal court.<sup>8</sup> Accordingly, once the designated period had elapsed the victim could not commence a new proceeding based upon the same incidents in the other court.<sup>9</sup>

Effective January 1, 1996, the Family Protection and Domestic Violence Intervention Act (DVIA)<sup>10</sup> dramatically alters the way in which instances of domestic violence will be handled by law enforcement officials, the courts, the victims and their attorneys. This Act suggests that domestic violence cannot be viewed or dealt with as merely a "social problem."<sup>11</sup> Rather, through the DVIA, the legislature has declared that in order to stem the tide of such violent incidents, offenders must be treated harshly, swiftly and punitively. In relevant part, the introductory paragraph of the bill provides:

The legislature further finds and declares that domestic violence is criminal conduct occurring between members of the same family or household which warrants stronger intervention than is presently authorized under New York's laws. . . . Therefore, the legislature finds and determines that it is necessary to strengthen materially New York's statutes by providing for immediate deterrent action by law enforcement officials and members of the judiciary, by increasing penalties for acts of violence within the household, and by integrating the purposes of the family and criminal laws to assure clear and certain standards of protection for New York's families consistent with the interests of fairness and substantial justice.<sup>12</sup>

In essence, the DVIA accomplishes four major changes in the law. First, the new statute puts into place *mandatory arrest procedures* which must be implemented by law enforcement offi-

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8. N.Y. FAM. CT. ACT § 812(2)(e) (McKinney 1983 & Supp. 1995).

9. *People v. Perez*, 109 Misc. 2d 291, 440 N.Y.S.2d 166 (N.Y. Crim. Ct. 1981).

10. 1994 N.Y. Laws ch. 222. The Family Protection and Domestic Violence Intervention Act amends various provisions of the Family Court Act, Domestic Relations Law, Criminal Procedures Law, Penal Law, Judiciary Law and Executive Law. The mandatory arrest provisions of this law were to take effect on July 1, 1995 and sunset on January 1, 2001. Subsequent amendments have pushed back the effective date of the mandatory arrest provisions from July 1, 1995 to October 1, 1995 and now January 1, 1996.

11. *Id.* § 1.

12. *Id.*

cial.<sup>13</sup> As a result of this Act, police officers *must* arrest an abuser or offender if they have reasonable cause to believe such individual:

has committed a felony upon a member of his or her family or household; or has violated an order of protection by committing a "family offense"; or has violated the "stay away" provisions of an order of protection; or has committed a misdemeanor constituting a "family offense", unless the victim requests otherwise. However, with regard to this latter provision, the police are specifically precluded from asking the victim of a misdemeanor family offense whether he or she is seeking the arrest of the assailant.<sup>14</sup>

These mandatory arrest provisions took effect on January 1, 1996. However, even prior thereto, most police departments, including the City of New York, had already put into place, guidelines and protocols which effectuated the policy of the DVIA and, in some instances, enlarged upon it. The intent of the mandatory arrest provision is to remove from the police officer (and for that matter, the victim) the discretion of not arresting the assailant. For all intents and purposes, whenever police officers are called to the scene of a report of domestic violence and are shown an existing order of protection or any evidence of physical injury, an arrest will be made.

Secondly, the DVIA repeals the prior three-day "choice of forum" rule, which precluded victims of family violence from securing access to both family and criminal court.<sup>15</sup> Presently, a victim of a family offense may now bring the case to the criminal court, the family court, or both courts.<sup>16</sup>

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13. *Id.* § 32 (codified at N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney Supp. 1995)).

14. *Id.*

15. As used in this article, the term "criminal court" refers to those courts exercising jurisdiction over penal law felonies, misdemeanors and violations including but not limited to the justice courts, town courts, district courts and county courts of the State of New York.

16. Notwithstanding the fact that the legislation speaks of the "right" to proceed in the criminal court, it must be remembered that the district attorney's office always retains discretion as to the filing of accusatory instruments. An individual has an unqualified right to file a petition in the family court and cannot be refused access to that court. This is not the case in criminal court. However, as a practical matter, a district attorney's office would be loathe to refuse to file an accusatory instrument where a prosecutable crime exists. In addition, a district attorney must make a reasonable effort to notify the victim of a domestic violence incident when a decision has been made to decline prosecution of the crime, to dismiss the

Third, the DVIA grants to both the family court and the criminal court expanded sanctions and remedies in dealing with instances of domestic violence. For example, family court judges have been granted greater latitude: (i) to issue warrants of arrest,<sup>17</sup> (ii) to issue longer orders of protection,<sup>18</sup> (iii) to direct restitution of up to \$10,000.00,<sup>19</sup> (iv) to grant immediate temporary orders of child support<sup>20</sup> and (v) to direct a respondent to participate in a "batterer's education program".<sup>21</sup> Similarly, criminal court judges have increased authority to grant similar items of relief referred to above, as well as longer Adjournments in Contemplation of Dismissal ("ACD")<sup>22</sup>. Moreover, various provisions of the penal law have been amended to increase the penalties for stalking, menacing and criminal contempt.<sup>23</sup>

Fourth, the DVIA provides for increased information, training and cooperation between the police, the judges and the district attorneys. For example, a computerized state-wide registry of orders of protection and arrest warrants has been in operation since October 1, 1995. In addition, the New York Judiciary Law section 212<sup>24</sup> has been amended to require that there be sharing of information regarding family offense proceedings in family and criminal court.<sup>25</sup> Moreover, the DVIA provides for the training of judges and district attorneys in the requirements of new law.<sup>26</sup> Ironically, no statutory provision requires that civil or criminal defense attorneys be so trained.

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criminal charges against the defendant or to enter into a plea arrangement. Moreover, where the family offense has been transferred from the family court to the criminal court, the district attorney must advise the family court judge of the disposition of the criminal case. N.Y. CRIM. PROC. LAW § 530.12(14) (McKinney 1995).

17. N.Y. FAM. CT. ACT § 827(a) (McKinney Supp. 1995).

18. *Id.* §§ 828(3) & 842(h).

19. *Id.* § 841(e).

20. *Id.* § 828(4).

21. *Id.* § 841(c).

22. N.Y. CRIM. PROC. LAW § 170.55 (McKinney Supp. 1995).

23. N.Y. PENAL LAW § 240.25 (McKinney 1989 & Supp. 1995); N.Y. PENAL LAW § 120.14 (McKinney Supp. 1995); N.Y. PENAL LAW § 215.51 (McKinney 1988 & Supp. 1995).

24. N.Y. JUD. LAW § 212(e) (McKinney Supp. 1995).

25. *Id.*

26. 1994 N.Y. Laws ch. 222 § 48, as amended by 1994 N.Y. Laws ch. 224 § 9.

### III. Representing Clients in Family Offense Proceedings Under Article 8 of the Family Court Act

Given the prevalence of domestic violence in our society today, the family law practitioner is likely to represent a petitioner or respondent in a family offense proceeding under Art. 8 of the FCA. Initially, the practitioner must appreciate that the handling of this "civil proceeding" can have profound consequences for his or her client, particularly in light of the fact that parallel criminal prosecutions may be pending or contemplated. Thus, no one should venture into such a proceeding without a complete awareness of the relevant statutory provisions.

#### A. *The Case for Petitioner*

##### 1. *Initial Consultation and Advice*

In most instances, the average practitioner comes in contact with a victim of domestic violence when handling a pending or contemplated matrimonial action. Typically, in the initial phases of the attorney/client consultations, significant time is spent extracting necessary financial information. Attorneys frequently pay too little attention to the grounds for divorce, and even less attention to whether their client has been the victim of domestic violence. In the initial phases of the consultation, it is critical for the attorney to explore these areas. If the client has already been the victim of such episodes, the attorney must make every attempt to obtain corroborative evidence. Such evidence includes criminal convictions, police reports, hospital reports, and prior family offense petitions and orders.

Also, while attorneys are now required to give their clients a "Client's Bill of Rights,"<sup>27</sup> the attorney is not required to provide information concerning community resources available to victims of domestic violence. At the very least, attorneys should explain to their client what he or she should do if there is any further violence. The client's right to compel and the police officer's obligation to perform arrests should be discussed immediately. While it is anticipated that police officers will be fully familiar with their statutory duty, a client who understands his or her rights will find it easier to deal with the assailant as well

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27. N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.2 (1995).

as the police officers who are called to the scene of a violent episode.

For example, under the DVIA, a police officer investigating a family offense *must* advise the victim of the availability of a shelter or other services in the community, and provide written notice to the victim of all their statutory rights and remedies.<sup>28</sup> A police officer is further required to assist a victim of domestic violence in removing personal effects from the home, locating safe havens such as a domestic violence shelter or the residence of a friend or family member, and transporting a victim and his or her children to the safe haven.<sup>29</sup> In addition, the police officer must assist the victim in obtaining medical treatment, and provide copies of incident reports to the victim at no cost. Moreover, the police officer must inform the victim of his or her rights to proceed in the criminal court, the family court or both. Finally, the police officer's discretion with regard to arresting the alleged assailant has been severely circumscribed by statute, as explained above.

In addition to the foregoing, the family law practitioner should provide the client with the names and telephone numbers of community resources, such as shelters, the New York State Coalition Against Domestic Violence and the New York Child Abuse Hotline Registry. (See Appendix A) Armed with such information, the client will then be better able to deal with any future episode of domestic violence.

## 2. *Initiating Family Court Proceedings*

When an episode of domestic violence occurs, the victim must decide whether to initiate and pursue proceedings in the family court. No longer is the victim bound to his or her initial choice of forum. Instead, the victim may proceed in either the criminal court, the family court or both.<sup>30</sup> Moreover, such parallel proceedings should not be considered duplicative, particularly because a family court petitioner may obtain relief not readily available in the criminal court. For example, as part of the application for a temporary order of protection,<sup>31</sup> a peti-

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28. N.Y. FAM. CT. ACT § 812(5) (McKinney Supp. 1995).

29. *Id.* See also N.Y. CRIM. PROC. LAW § 530.11 (6) (McKinney 1995).

30. N.Y. FAM. CT. ACT § 812 (McKinney Supp. 1995).

31. *Id.* § 828(1)(a).



tioner may now receive a temporary order of child support, a medical support execution, a temporary order of custody, as well as temporary exclusive use and occupancy of the marital residence.<sup>32</sup>

The practitioner should not overlook the importance of obtaining an immediate *ex parte* order of child support. Until now, application for such support orders required the filing of petitions under Art. 4 of the FCA,<sup>33</sup> statements of net worth,<sup>34</sup> service of the petitions and court process.<sup>35</sup> Typically, the return date for this support petition was a number of weeks after the filing date. In the interim, the victim and her children may not have had the financial ability to pay for alternate housing and other necessities. Now, upon the *initial* appearance before the family court judge on a request for a temporary order of protection (the timing of which is within the control of the petitioner), the court may immediately issue a temporary order of child support. The petitioner need not show immediate or emergency need, or produce information regarding the respondent's income or assets.<sup>36</sup>

The amendment to FCA section 828 refers only to the right of the court to fix a temporary order of *child support*. However, a childless victim of domestic violence may also need support. Where the parties are married, a statutory obligation to support the spouse is present.<sup>37</sup> Thus, the failure to include language authorizing the court to grant an immediate order of *spousal* support may be viewed as a legislative oversight which the court may correct.

Apart from the obvious benefits of obtaining immediate financial relief in the family court, as well as the opportunity to secure orders of custody and "stay away" orders of protection,<sup>38</sup> the practitioner should not forget that the ultimate burden of proof with regard to the allegations of a petition is a "fair pre-

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32. *Id.* § 828(4).

33. *Id.* § 423.

34. *Id.* § 424-a.

35. *Id.* § 427.

36. *Id.* § 828(b)(4).

37. *Id.* § 412.

38. A stay away order of protection operates as a grant of exclusive use and occupancy of the marital residence.

ponderance of the evidence.”<sup>39</sup> In the criminal court, the burden is “proof beyond a reasonable doubt” - a much higher standard. Thus, it is easier to obtain the ultimate relief sought in the family court.

Once the victim has decided to file a family offense proceeding, the next tactical decision is whether the attorney should prepare a family offense petition *and* appear with the petitioner for the *ex parte* application for a temporary order of protection. Certainly many petitioners successfully initiate family offense proceedings without the assistance of counsel. By statute and court rule, the family court must assist the petitioner in preparing the petition (the drafting is usually done by a probation officer employed by the county), and must grant court access either on the day the petitioner initially appears or “the next day that the family court is open.”<sup>40</sup>

The assistance of counsel is not only a statutory right,<sup>41</sup> but also advisable, especially in the early stages of the proceedings. For example, an attorney representing the petitioner is more likely to draft a legally sufficient complaint. By appearing with the petitioner at the initial *ex parte* proceeding, counsel will be able to make appropriate applications for child support, custody and related relief. Every practitioner should have in his or her office current copies of the family offense forms which can be obtained from the family court.<sup>42</sup>

Once a temporary order of protection has been obtained, counsel for the petitioner should arrange service upon the respondent of the family offense petition, the summons, and the temporary order of protection. The petitioner may want to have a police or peace officer serve these documents. This will not only save the party the cost of a process server, but also signal to the respondent the seriousness of the matter.<sup>43</sup> Also, copies of the temporary order of protection should be given to the police departments or agencies where the petitioner resides and

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39. *Id.* § 832.

40. N.Y. FAM. CT. ACT § 153-c (McKinney 1983). *See id.* § 216-c. *See also* N.Y. Comp. Codes R. & Regs. tit. 22, § 205.71 (1995).

41. N.Y. FAM. CT. ACT § 262(A)(ii) (McKinney 1983 & Supp. 1995).

42. *Id.* § 216-b.

43. *See* N.Y. FAM. CT. ACT § 153-b(b) (McKinney Supp. 1995) (allowing peace officers and police officers to serve summonses, petitions or temporary orders of protection upon request).

works. The petitioner should also carry a copy of the order at all times. While the need for such action may be obviated by the Statewide Central Registry which went into effect October 1, 1995, nothing is lost by taking these additional precautionary steps.

In the alternative, if the petitioner establishes the necessary prerequisites, the court may also secure the attendance of the accused by means of a warrant of arrest.<sup>44</sup> One statutory predicate for the issuance of a warrant is the presence of "aggravating circumstances".<sup>45</sup> This term is defined by the statute to include circumstances where the assailant has caused "physical injury" or "serious physical injury" to the petitioner, used a "dangerous instrument", has a history of repeated violations of prior orders of protection or prior convictions.<sup>46</sup> Counsel for petitioner should be aware of these circumstances and be able to present them to the court as part of the initial application for a temporary order of protection and a warrant of arrest.

### 3. *Preliminary Proceedings*

Upon filing the petition, the court will fix a return date for the preliminary proceedings. In most instances, the return date is within the period when the temporary order of protection will expire. However, the practitioner should remember that if the preliminary proceeding does not occur within that time frame, he or she can apply to the court for an extension of the temporary order of protection.<sup>47</sup> This application may be made *ex parte* or on notice, as the court may direct.<sup>48</sup>

Upon the initial appearance before the court on a family offense petition, both the petitioner and respondent must be advised of certain rights they have, including the right to counsel.<sup>49</sup> By virtue of the DVIA, the family court judge must inquire about the existence of any other orders of protection involving the parties.<sup>50</sup> In addition, the respondent must be told

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44. N.Y. FAM. CT. ACT § 827(a) (McKinney Supp. 1995).

45. *Id.* § 827(a)(vii).

46. *Id.*

47. *Id.* § 828(3).

48. *Id.*

49. *Id.* § 812(5); *see id.* § 1033-b(1)(b).

50. *Id.* § 821-a(6).

the allegations of the petition, and be provided with a copy of the petition.<sup>51</sup> Assuming that the matter is not disposed of at the preliminary proceeding, the court must consider whether to release the respondent on his or her own recognizance or direct the respondent to post bail.<sup>52</sup>

In most courts, it is common for a court representative such as a probation officer to determine whether the matter can be disposed of without further court proceedings. Although there is no statutory authority, custom and usage allows the court to accept a consent to the issuance of a permanent order of protection "without admitting or denying the allegations." However, such a disposition or "plea" does not represent a finding on the merits of the allegations of the petition.

Furthermore, petitioner and counsel should be wary of accepting "mutual" orders of protection as an informal way of resolving the matter. Indeed, the family court is statutorily precluded from issuing affirmative relief to a respondent where no petition or answer containing a counterclaim alleging a family offense has been filed with the court.<sup>53</sup> In most instances, denials are entered at the preliminary proceedings and the matter is set down for further hearings.

#### 4. Hearings

##### a. Fact Finding Hearing

If a denial has been entered in response to a family offense petition, the court must hold a fact-finding hearing to determine whether the allegations can be supported by "a fair preponderance of the evidence".<sup>54</sup> Only competent, material, and relevant evidence is admissible.<sup>55</sup> This hearing may not be held sooner than three days after the service of the petition, unless the respondent consents.<sup>56</sup> Moreover, the court may adjourn such hearing, for good cause, *sua sponte* or on motion of either

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51. *Id.* § 1033-b(1)(b).

52. N.Y. CRIM. PROC. LAW § 510.10 (McKinney 1995); *see id.* §§ 510.15-.30 (procedures and rules guiding court's decision).

53. N.Y. FAM. CT. ACT § 841 (McKinney Supp. 1995).

54. N.Y. FAM. CT. ACT § 832 (McKinney 1983).

55. *Id.* § 834.

56. *Id.* § 826(a).

party.<sup>57</sup> The petitioner is entitled to have a "non-witness friend, relative, counsellor or social worker present in the courtroom."<sup>58</sup> A more limited right to have an "ally" in the courtroom exists for respondents (i.e., when such individual is not represented by counsel).<sup>59</sup>

Before the fact-finding hearing, the practitioner should do a number of things. First and foremost, the petition should be examined for legal sufficiency, especially if it was not drafted by an attorney. In doing so, the examiner should recall that the term "family offense" as used in the FCA and New York Criminal Procedure Law has a very definite meaning.<sup>60</sup> Not every criminal act committed by one family member upon another is a "family offense." The family court may exercise jurisdiction only where the acts committed constitute one or more of the following penal law violations:

- disorderly conduct;
- harassment in the first degree;
- harassment in the second degree;
- menacing in the second degree;
- menacing in the third degree;
- reckless endangerment;
- assault in the second degree (or an attempted assault);
- assault in the third degree (or an attempted assault).<sup>61</sup>

All other criminal acts between family members (e.g., larceny, criminal possession of a weapon, criminal mischief or rape) can only be prosecuted in the criminal court.<sup>62</sup> Thus, when determining whether alleged conduct falls within one of the enumerated offenses, reference must be made to the particular provisions of the penal law which define such offenses.<sup>63</sup>

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57. *Id.* § 836(a).

58. *Id.* § 838.

59. *Id.*

60. See *Roofeh v. Roofeh*, 138 Misc. 2d 889, 525 N.Y.S.2d 765 (Sup. Ct. Nassau County 1988); *DiDonna v. DiDonna*, 72 Misc. 2d 231, 339 N.Y.S.2d 592 (Fam. Ct. Ulster County 1972).

61. N.Y. CRIM. PROC. LAW § 530.11 (McKinney 1995).

62. *Id.*

63. See N.Y. PENAL LAW §§ 240.20, 240.25, 240.26, 120.14, 120.15, 120.20, 120.25, 120.00 and 120.05. For a more extensive discussion of these Penal Law offenses as they apply to Article 8 of the FCA, see Ronald J. Bavero, *Family Offenses, I Know Them When I See Them*, FAM. L. REV., May 1986, at 22.

After having examined the petition for sufficiency, the practitioner is then ready to prepare the witnesses for the hearing and to marshal the evidence which will be produced at the said hearing. The practitioner should first obtain copies of all prior statements made by his or her client regarding the allegations in the petition. For example, the practitioner should obtain the petitioner's testimony before the family court during the *ex parte* application for a temporary order of protection, as well as police reports and hospital reports. In addition, if any of the incidents referred to in the petition were also discussed in affidavits or pleadings submitted to the supreme court, such documents should be reviewed. All of these documents should be discussed with the petitioner, especially if any inaccuracies or inconsistencies are contained therein.

Next, the practitioner should prepare the client for direct and cross-examination, with a view toward establishing each and every element of the family offense petition. Care must be taken to establish that the respondent's *conduct* falls within the statutory definition of the offense (i.e. the respondent caused physical injury), and that the respondent acted with the requisite culpable mental state (i.e. the respondent intentionally or recklessly caused such injury).

Finally, the practitioner should consider the availability and the utility of corroborative evidence. Photographs which portray the injuries are important. Tape recordings of the respondent screaming at the petitioner or making threats can be particularly effective. Certified copies of hospital reports<sup>64</sup> as well as certified copies of prior court orders, and convictions of the family or criminal court are also helpful. The practitioner should not overlook the usefulness of any prior determination of the criminal court. Assuming that a parallel criminal proceeding has resulted in a conviction of the respondent, by plea or trial, on the very same allegations which are the subject of the instant family court petition, the practitioner may invoke the doctrine of collateral estoppel by using the criminal court conviction and eliminating the need for a fact-finding determination in the family court. If the respondent has been convicted of the very same offense in a criminal court (the standard of proof

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64. See N.Y. CIV. PRAC. L. & R. § 4518(c) (McKinney 1992 & Supp. 1995).

being proof beyond a reasonable doubt - a higher standard than required in the family court), that conviction is conclusive proof of the underlying facts and need not be relitigated in the subsequent family court proceeding.<sup>65</sup> Thus, a motion for summary judgment on the family offense allegations would be appropriate.<sup>66</sup>

Typically, at the conclusion of the fact-finding hearing, the court decides whether or not the petition has been sustained. In the event the petition has not been sustained, a dispositional order dismissing the petition will be entered.<sup>67</sup> However, if the allegations of the petition are established, the court is then required to hold a dispositional hearing.<sup>68</sup>

### b. *Dispositional Hearing*

Following the pattern found throughout the FCA, Art. 8 contemplates two separate hearings: one to establish the veracity of the allegations, and the second to determine what type of dispositional order is appropriate.<sup>69</sup> The dispositional hearing may commence immediately following the fact-finding hearing,<sup>70</sup> or the court may adjourn the second hearing in order to obtain additional information relevant to the disposition.<sup>71</sup> For example, the court may order a probation investigation.<sup>72</sup> In addition, counsel for the petitioner may seek to introduce testimony or evidence which was technically inadmissible at the fact-finding hearing.<sup>73</sup> For example, one of the dispositional al-

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65. See *S.T. Grand Inc. v. City of New York*, 32 N.Y.2d 300, 298 N.E.2d 105, 344 N.Y.S.2d 938 (1973); *Schwartz v. Pub. Adm'r of County of Bronx*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

66. See *Suffolk County v. James M.*, 83 N.Y.2d 178, 630 N.E.2d 636, 608 N.Y.S.2d 940 (1994). In *James M.*, the Court of Appeals precluded the respondent in a proceeding under Article 10 of the FCA from relitigating the issue of abuse where he had been previously convicted of sexually abusing this same stepchild in the criminal court. 83 N.Y.2d at 182-83, 630 N.E.2d at 637-38, 608 N.Y.S.2d at 941-42. In doing so, the Court of Appeals approved of the use of a motion for summary judgment as the appropriate vehicle to raise the defense of collateral estoppel. 83 N.Y.2d at 182, 630 N.E.2d at 637, 608 N.Y.S.2d at 941.

67. N.Y. FAM. CT. ACT § 841(a) (McKinney 1983 & Supp. 1995).

68. *Id.* § 835(a).

69. *Id.* §§ 832, 833.

70. *Id.* § 835(a).

71. *Id.* § 836(b).

72. *Id.* § 1047 commentary at 401.

73. *Id.* § 834.

ternatives available to the court under prior law was the issuance of a permanent order of protection for a period of up to *one* year.<sup>74</sup> However, as a result of the DVIA, the court is now authorized to issue a three year order of protection where there are "aggravating circumstances" - the same aggravating factors the court must assess in determining whether to issue a warrant of arrest.<sup>75</sup> Thus, even if proof of prior instances of domestic violence, violations of prior orders, or incidents involving the respondent and *other* family members has not been submitted in the fact-finding hearing, such evidence may now be received at the dispositional hearing. Since it is usually not the practice of the court to hold separate hearings, it is respectfully suggested that counsel attempt to present such proof as part of the fact-finding hearing. However, if the court will not allow such testimony as part of a separate fact-finding hearing, the counsel for the petitioner should seek to include it as part of the dispositional hearing.

c. *Orders*

(1) *Orders of Disposition*

At the conclusion of the dispositional hearing, the court has various options available. It may enter an order:

- (a) Dismissing the petition, based upon a failure of proof;<sup>76</sup>
- (b) Suspending judgment for a period not in excess of six months;<sup>77</sup>
- (c) Placing respondent on probation for a period not exceeding one year and requiring respondent to participate in a batterer's education program;<sup>78</sup> or
- (d) Making an order of protection for up to one year or three years, depending upon the existence of aggravating circumstances;<sup>79</sup> or
- (e) Directing the payment of restitution in an amount not to exceed \$10,000.00;<sup>80</sup> or

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74. *Id.* § 842.

75. *Id.* §§ 827, 842.

76. *Id.* § 841(a).

77. *Id.* § 841(b).

78. *Id.* § 841(c).

79. *Id.* § 841(d).

80. *Id.* § 841(e).



- (f) Combining certain of the dispositional alternatives. (i.e., an order of protection and an order of restitution).<sup>81</sup>

Both the FCA and the Uniform Rules for the Family Court prescribe the permissible terms and conditions which may be attached to each type of order.<sup>82</sup> Thus, respondents may be required to abstain from certain forms of offensive behavior; to stay away from the petitioner's home, place of employment or school; to cooperate in obtaining medical, psychiatric or substance abuse treatment; to attend a batterer's education program; to pay for medical bills, child support and restitution. Moreover, successful petitioners who elect to be represented by retained counsel may obtain an award of counsel fees and disbursements as a condition of an order of protection.<sup>83</sup>

Finally, FCA section 841 now precludes the belated and defensive applications for a "mutual" order of protection, unless a proper pleading has been filed. In relevant part, section 841 declares that:

"No order of protection may direct any party to observe conditions of behavior unless the party requested in the order of protection has served and filed a petition or counter-claim in accordance with Section 150-4-b of this act."<sup>84</sup>

### B. *Representing Respondents in Article 8 Proceedings*

Over the past number of years, the family law practitioner, particularly one representing clients in matrimonial actions, has been called upon to become familiar with a wide variety of related legal areas in order to properly represent a client. Typically, the matrimonial attorney must be familiar with the Domestic Relations Law, the FCA, Internal Revenue Code, and the Bankruptcy Act. In addition, he or she must be familiar with corporate law, real estate law and principals of accounting and with the advent of the DVIA, attorneys need to be familiar with criminal procedure law and penal law as well.

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81. *Id.* § 841.

82. *Id.* § 842; N.Y. COMP. CODES R. & REGS. tit. 22, § 205.74 (1995).

83. N.Y. FAM. CT. ACT § 842(f) (McKinney Supp. 1995).

84. *Id.* § 841.

Given the mandatory arrest provisions<sup>85</sup> of the DVIA, it is highly probable that during the course of one's matrimonial practice, the practitioner will receive a call from a client who has been arrested. Thus, the practitioner should familiarize himself with criminal procedure law provisions dealing with bail, release on one's own recognizance and basic practice in the local criminal court. In the alternative, the family law practitioner should become familiar with criminal law attorneys who can handle such exigent circumstances.

Moreover, every attorney handling an Art. 8 proceeding must be profoundly aware that this civil proceeding can have enormous consequences on any parallel criminal proceeding which is pending or contemplated. Statements made by a respondent during the course of this civil proceeding may be used as admissions in any related criminal action. Indeed, as part of the DVIA, a new section of the criminal procedure law has been added. New York Criminal Procedure Law § 60.46 provides that evidence of a written or oral admission or any testimony given by a respondent is barred from use in a criminal proceeding only where the party against whom such statement or testimony is offered is without the benefit of counsel at the time that such statement is made. The necessary corollary is that when such statements or testimony are made at a time that the party has counsel, they may also be used in the criminal proceeding. Moreover, FCA section 815 requires the family court, upon written request of the district attorney, to provide a copy of the transcript of any family offense proceeding to the district attorney when necessary to conduct a criminal investigation or prosecution involving the petitioner or the respondent. With this background in mind, we turn now to an examination of the issue of how best to represent a respondent in the family court proceeding.

### 1. *Initial Consultation and Advice*

As is the case with representing petitioners, the attorney should obtain, during the initial consultation or stages of the attorney/client relationship, all relevant information concerning prior acts of violence within the family. The client should be

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85. N.Y. CRIM. PROC. LAW § 140.10 (McKinney Supp. 1995).

given the same information about the new mandatory arrest provisions and telephone numbers to be used in case of an emergency. Moreover, where the client is the subject of a temporary order of protection, thought must be given as to whether the client should continue to reside with the petitioner pending the resolution of the matter.

## 2. *Preliminary Appearance in the Family Court*

As soon as respondent has been served the family offense petition, the attorney should scrutinize the petition for legal sufficiency. If the allegations do not rise to the level of a family offense, a motion to dismiss should be prepared. Counsel may wish to make an immediate application to vacate the temporary order of protection, particularly when the order is based upon a defective petition. In the past, such applications could have been made *ex parte* since the temporary order was obtained in that fashion. However, by virtue of the DVIA amendment of FCA section 154-b, any motion to vacate or modify an order of protection must be on notice to the non-moving party.

Additionally, counsel for the respondent should consider whether the facts justify the filing of a family offense petition against the petitioner and a request for a temporary order of protection on behalf of the respondent. This should *not* be done automatically or as a tactical maneuver without regard to the facts and law relative to whether a family offense has actually been committed by the petitioner. Respondent's counsel may also assert such allegations as a counterclaim filed in an answer.<sup>86</sup> However, the latter procedure does not afford the respondent the opportunity to obtain an immediate temporary order of protection on his or her behalf.

Moreover, respondent's counsel should be alert to whether the petition contains extraneous, scandalous and prejudicial material. If it does, a motion to strike, pursuant to CPLR section 3024, should be made as well. For example, if the petition contains additional information concerning prior family offense proceedings and orders, one may legitimately argue that such allegations have no place in the petition, but rather are appropriate only to disposition.

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86. N.Y. FAM. CT. ACT § 154-b (McKinney 1983 & Supp. 1995).

### 3. *Preliminary Proceedings in Family Court*

Upon the initial appearance before the family court, respondent's counsel should waive a reading of the petition and further advisement of the respondent's rights. Thought should be given to whether to set the matter down for a hearing or to attempt to resolve the case at the initial proceedings. Most family courts allow a respondent to consent to an order of protection "without admitting or denying the allegations." This type of disposition may be appropriate and wise under certain circumstances. For example, where the evidence is strongly against the respondent, such a disposition may be prudent because it does not represent a finding on the merits of the case. Secondly, a resolution of the matter in the family court may dissuade the district attorney from further prosecution of the matter in family court. Third, the respondent will not be in a position where admissions or statements made during the course of the family court proceeding will thereafter be used against him or her in the criminal proceeding.<sup>87</sup>

In the event a strategic decision is made to enter a denial, the matter will then be fixed for a hearing. If the respondent is in custody and cannot make bail, the hearing must be held in the family court within 120 hours of the arrest, unless a weekend occurs in the interim and, in that event, within 144 hours of arrest.<sup>88</sup> Typically however, the hearings will not take place for a number of weeks after the preliminary proceedings. In that time period, counsel will have the opportunity to seek further discovery and disclosure and make appropriate motions to dismiss. It should be noted that the case law which has developed under Article 8 severely restricts the right of a respondent's attorney to obtain discovery. For example, in *Kunz v. Kunz*,<sup>89</sup> the court turned aside a respondent's request for an examination before trial (EBT) of the petitioner. *Kunz* does not however, stand for the proposition that no discovery may be afforded. For example, Bills of Particular or discovery of medical records, as well as interrogatories, may be employed to flesh out the scope of the petition.

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87. N.Y. CRIM. PROC. LAW § 60.46 (McKinney Supp. 1995).

88. N.Y. FAM. CT. ACT § 821-a (McKinney 1983 & Supp. 1995).

89. 119 Misc. 2d 80, 462 N.Y.S.2d 559 (Fam. Ct., Nassau County 1983)

In addition, the respondent's counsel should make every effort to obtain all of the prior statements made by the petitioner. Attempts should be made to secure hospital records and police reports which include statements made by the petitioner. In addition, the respondent's counsel should order a copy of the minutes of the petitioner's original application for a temporary order of protection, since it will contain the petitioner's version of the facts and incident under examination. The respondent's counsel should also review affidavits and pleadings made by the petitioner in the supreme court to see whether other references are made to allegations contained in the petition.

#### 4. *Fact-Finding Hearing*

Every attempt should be made to keep testimony within the four corners of the petition and not allow the petitioner or counsel to expand upon the allegations previously made. In many instances, the petitioner's counsel has never prosecuted criminal cases nor presented family offense petitions. Accordingly, an important element of the defense may be watching for defects in the proof. For example, the respondent's conduct may not precisely fit within the statutory elements of harassment or disorderly conduct. The petitioner's counsel may omit necessary proof with regard to the existence of physical injury.<sup>90</sup> Moreover, counsel may have failed to demonstrate that the respondent acted with the necessary culpable mental state (i.e., with intent to harass, intent to cause physical injury, etc.). For example, in *DiDonna v. DiDonna*,<sup>91</sup> the petitioner alleged that the respondent engaged in certain conduct but the respondent successfully responded that such conduct was not done with the intent to harass or to cause public inconvenience, annoyance and alarm.<sup>92</sup>

Finally, counsel for the respondent should be alert to the constitutional issues raised when the petitioner attempts to call the respondent as a witness in the case. First and foremost, the respondent, like a criminal defendant, has a constitutional right

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90. See *Matter of Phillip A.*, 49 N.Y.2d 198, 400 N.E.2d 358, 424 N.Y.S.2d 418 (1980) (dealing with the insufficiency of evidence presented by the prosecutor regarding "physical injury").

91. 72 Misc. 2d 231, 339 N.Y.S.2d 592 (Fam. Ct. Ulster County 1972).

92. 72 Misc. 2d at 237, 339 N.Y.S.2d at 599.

to remain silent where the answer might incriminate him in a future criminal proceeding.<sup>93</sup> However, unlike a criminal case, the respondent in this Article 8 civil proceeding may be called by the adverse party. Typically however, when a party to a civil proceeding elects to assert his Fifth Amendment privilege, an adverse inference can be drawn.<sup>94</sup> However, counsel for respondent can argue (in this context, and particularly where there is a parallel criminal proceeding) that no such adverse inference is appropriate since it would impermissibly infringe upon the defendant's rights in the criminal proceeding and chill his decision in the pending civil proceeding.

### 5. *Dispositional Hearing on Petitions*

At the conclusion of the fact-finding hearing and assuming that a dismissal has not occurred, counsel for respondent should request a separate dispositional hearing. At that point, additional evidence may be introduced, which is relevant to the dispositional alternatives. For example, material which might otherwise be inadmissible at the fact-finding hearing (e.g., letters and affidavits from ministers, clergy members, and other character references) is admissible at the dispositional hearing.

### 6. *Violation Proceedings*

While orders of protection are intended to stop the cycle of violence, they are neither magical nor foolproof. Not surprisingly, the successful petitioner may find the need to seek enforcement of the order on one or more occasions. The DVIA substantially strengthens the penalties which arise from any violation of an existing court order. For example, if the violation involves a further family offense, the petitioner may elect to pursue this new matter in the criminal court (i) as an original criminal offense, and (ii) as an act constituting criminal contempt.<sup>95</sup> Alternatively, the petitioner may proceed in the family court as (i) a new petition or (ii) a violation petition in the fam-

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93. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (stating defendant is privileged "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").

94. *Id.*

95. N.Y. PENAL LAW §§ 215.50-51 (McKinney 1988).

ily court under FCA section 846. The petitioner may also proceed in both courts (subject to double jeopardy limitations).

In this regard, there are both constitutional and statutory limitations which protect an individual from repeated incarceration or punishment for the same offense.<sup>96</sup> However, such difficult and esoteric issues can be avoided by the type of cooperation and discretion which is now vested by the DVIA in the courts, the prosecutors and the victims of violent acts. The mere fact that a victim may have a *right* to proceed in more than one court does not mean that such multiple proceedings are necessary or advisable.

In any event, based upon a violation proceeding under section 846-a, the family court is authorized to incarcerate the respondent for a period of up to six months. A family court sentence of six months means exactly that - there is no time off for good behavior or other minimizations of such a sentence. Moreover, any violation of a court order, including a temporary order of protection, gives the court the right to immediately revoke pistol licenses and permits, and to direct the immediate surrender of any and all firearms.<sup>97</sup>

The procedure for filing and service of any violation petition is outlined in FCA section 846. In this regard, care should be taken to assure that if a summons is employed as a method of securing the respondent's presence before the court, the appropriate warnings appear on the face of the summons.<sup>98</sup> Indeed, the absence of such warnings is a jurisdictional defect which may lead to dismissal of the violation proceeding.

Finally, it should be noted that a respondent is entitled to the same two-fold hearing process as employed on the initial petition. However, it is respectfully suggested that the burden of proof at a violation hearing must be more than the fair pre-

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96. See *Blockburger v. United States*, 284 U.S. 299 (1932) and *United States v. Dixon*, 113 S. Ct. 2849 (1993), for the leading constitutional cases involving the Double Jeopardy clause. Moreover, the rights of the respondent/defendant are further protected by N.Y. CRIM. PROC. LAW §§ 40.20, 40.30 and 40.54. For a concise discussion of the potential problems inherent in multiple proceedings involving the DVIA, see Lisa Fishchel-Wolovick, *Double Jeopardy and Domestic Violence Law*, N.Y. L.J., June 22, 1995 at 1.

97. N.Y. FAM. CT. ACT § 846-a (McKinney 1983 & Supp. 1995).

98. *Id.* § 846(b).

ponderance of the evidence, particularly in light of the possibility of incarceration.<sup>99</sup>

#### IV. Summary

Recent national events, such as the trial of O.J. Simpson, have cast the spotlight of national media upon the problem of domestic violence. Responding to this and other notorious cases of domestic violence, the New York Legislature has significantly strengthened the laws of this state with regard to the handling of domestic violence. It can reasonably be expected that the courts and law enforcement will no longer minimize or tolerate behavior which at its essence is violent, destructive and criminal. Assailants and people who perpetrate episodes of domestic violence will henceforth be treated harshly and swiftly. Unfortunately, it also may be anticipated that unscrupulous litigants and attorneys will seek to misuse this wave of public enlightenment for their own venal purposes. Thus, it will be left to the attorneys and the court to determine whether the instances reported require the full brunt of the law or whether there is a misuse of the system being perpetrated by one of the parties.

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99. *See Addington v. Texas*, 441 U.S. 418 (1979).



## APPENDIX A

NEW ROCHELLE  
FAMILY COURT  
(914)633-1288  
Third Floor  
420 North Avenue

WHITE PLAINS  
FAMILY COURT  
(914)285-1020  
Sixth Floor  
111 Grove Street

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crisis support for abused family members

**For Counseling and Support**  
**(914)949-1212**

**A service of Mental Health Association of  
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| Family Abuse Services .....                    | 949-1212     |
| Family Abuse Hotline .....                     | 997-1010     |
| My Sister's Place (Shelter) .....              | 969-5800     |
| Northern Westchester Shelter Hotline .....     | 747-0707     |
| N.Y. State Coalition Against Domestic Violence |              |
| Emergency .....                                | 800-942-6906 |
| Spanish .....                                  | 800-942-6908 |
| Putnam/No. Westchester                         |              |
| Women's Resource Center .....                  | 682-2166     |
| Rape Crisis Help Line .....                    | 682-9877     |
| New York Child Abuse                           |              |
| Hotline Registry .....                         | 800-342-3720 |
| Suicide Crisis Line .....                      | 946-0121     |
| United Way Helpline .....                      | 949-4636     |