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# Protective Orders in Texas

A STATE-WIDE STUDY OF POLICIES AND PRACTICES

**COLLABORATIVE REPORT BY:**

TEXAS COUNCIL ON FAMILY VIOLENCE • TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT  
TEXAS RIOGRANDE LEGAL AID • TEXAS ADVOCACY PROJECT





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Texas Association Against Sexual Assault  
Texas RioGrande Legal Aid  
Texas Advocacy Project

February 2013

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## Acknowledgements

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Notes about language: Throughout this report, individuals against whom protective orders have been sought or obtained are referred to as “respondent(s).” The use of this term reflects legal vernacular and is not intended to sterilize the destructive nature of family violence or sexual assault or diminish recognition of their impact on others' lives.

The words “applicant(s)” and “victim(s)” are used to describe people who have experienced family violence or sexual assault and are seeking or have sought a protective order. “Applicant” is a legal term describing someone requesting relief in a court of law. This report will use the term “victim” because it is most commonly used and understood. Further, the designation “victim” is used in the justice system to acknowledge that the applicant has been a victim of a crime, and dispels any misconception that the violence is the fault of anyone other than the respondent. The administrators of this project recognize that “victim” and other current labels are inadequate descriptions of those experiencing family violence or sexual assault.

Finally, because women are much more likely than men to be victimized by a current or former intimate partner,<sup>1</sup> or sexually assaulted in general, this document will use “she,” “her,” “woman,” and “women” when referring to a victim of family violence or sexual assault, though all victims deserve safety, security and advocacy, regardless of their gender identity or sexual orientation.

## **Project Purpose and Overview**

Prosecutors have great discretion in Texas in setting office policy and allocation of resources when responding to domestic violence and sexual assault in their community. They are accountable to the community and the voters who elect them. The purpose of this study is to analyze how those policies and procedures differ across the state with regard to protective orders for victims of domestic violence and sexual assault. Prior to this report, there was not a comprehensive, statewide survey of the widely different policies which determine whether or not a victim receives services when applying for a protective order.

It is important to note that many other factors, including police policy, availability of shelter services, access to mental health care, access to transitional housing and access to civil legal services play a role in determining whether or not a victim is protected from her abuser or rapist.

In the course of completing this study, it became clear that some prosecutors have limited knowledge about protective orders because their offices rarely accept applications for protective orders. Some offices report that they do not file protective orders because they do not receive requests for assistance from victims or shelter advocates. Several prosecutors reported outright that they did not believe that protective orders were useful.

Inconsistent practices among prosecutors in Texas in filing or not filing protective orders on behalf of family violence and sexual assault victims result in widely disparate outcomes for victims. This discrepancy is based squarely on the policies and practices of prosecutors highlighted in this report.

If protective orders are an important tool in providing safety and stability for Texas families in crisis, this is a problem.

## **Background**

In June of 2011, a report on the prevalence of intimate partner violence in Texas was released.<sup>2</sup> In that extensive phone survey of adult Texans, 23% of female participants reported experiencing physical violence, 2% reported sexual violence, and a separate 13% reported having experienced both physical and sexual abuse.<sup>3</sup> The striking results of this study established that although

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<sup>1</sup> *National Crime Victimization Survey: Criminal Victimization, 2000- 2008*. U.S. Department of Justice, Bureau of Justice Statistics.

<sup>2</sup> *Statewide Prevalence of Intimate Partner Violence in Texas*, Institute on Domestic Violence and Sexual Assault , Center for Social Work Research, School of Social Work at the University of Texas at Austin (June 2011).

<sup>3</sup> *Statewide Prevalence of Intimate Partner Violence in Texas*, Institute on Domestic Violence and Sexual Assault, Center for Social Work Research, School of Social Work at the University of Texas at Austin (June 2011).

national statistics estimate that one in four women in America will experience domestic violence during their lifetime,<sup>4</sup> that number is closer to one in three for women in Texas.<sup>5</sup> Researchers in that study included questions about some types of violence<sup>6</sup> recognized by experts in the field as “domestic violence”<sup>7</sup> (the term used in the study) that do not meet the legal definition of “family violence”<sup>8</sup> in our state. Therefore, not all self-identified female victims of “domestic violence” in the poll meet the legal standards of abuse necessary for a protective order in Texas, though all family violence victims have a right to access that remedy.

It is important to note that the issue of family violence is not isolated to adults. The chances that a high school age girl in America will experience dating violence are one in three.<sup>9</sup> In a nationwide study, 9.4% of high school students report being hit, slapped, or physically hurt on purpose by their boyfriend or girlfriend in the twelve months prior to the survey.<sup>10</sup> Approximately one in five teens who had ever experienced rape, physical violence, and/or stalking by an intimate partner, first experienced some form of partner violence between eleven and seventeen years of age.<sup>11</sup> This underscores the need for access to protective orders for teenage victims of intimate partner abuse as well.

In 2003, results from the first ever statement study to determine the prevalence of sexual assault in Texas were published.<sup>12</sup> Approximately 1.9 million adult Texans, or 13% of adult Texans have ever been sexually assaulted at some point in their lifetime. The proportion of sexual assault is much higher for females than males (20% versus 5%). For female adult victims in Texas 58% reported that the perpetrator was known to them; in 37% of the cases, the rapist was a relative, and in 14% of the cases, the rapist was a spouse or ex-spouse. Most sexual assaults occur in locations that are familiar to the victim or perpetrator. For women victims, 35% of sexual assaults occurred in their residence; 17% in perpetrators’ residence. Just 18% of sexual assaults in Texas are reported to law enforcement. The traditional prosecution-focused response to sexual assault is not working for their majority of sexual assault victims. Civil protective orders offer a measure of justice and the desired safety for the many sexual assault victims whose cases will never be prosecuted. For the victims whose cases are prosecuted, there are strong arguments that protective orders offer more and better protection than the bond conditions most often utilized to provide victim safety during an active criminal case.

In Texas, family violence protective order statutes are found in Chapters 81-85 of the Family Code. The law clearly states that “a court shall render a protective order... if the court finds that

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<sup>4</sup> *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, Tjaden, Patricia & Thoennes, Nancy. National Institute of Justice and the Centers of Disease Control and Prevention, (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at page 9. Queries included questions about: psychological abuse; coercive control and entrapment; physical violence; stalking and sexual assault

<sup>7</sup> See the “Power and Control Wheel,” developed by the Domestic Abuse Intervention Project, Duluth, Minnesota, (1984).

<sup>8</sup> Tex. Family Code Ann. Section 71.004 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>9</sup> Fifth and Pacific Companies, Inc, and National Dating Abuse Helpline study (2008).

<sup>10</sup> *Youth Risk Behavior Survey*, Centers for Disease Control and Prevention (2011).

<sup>11</sup> *National Intimate Partner and Sexual Violence Survey*, Centers for Disease Control and Prevention (2010).

<sup>12</sup> *A Health Survey of Texans: A Focus on Sexual Assault*, Busch, N.B., Bell, H., DiNitto, D.M., and Neff, J.A., University of Texas Institute of Domestic Violence and Sexual Assault (2003).

family violence has occurred and is likely to occur in the future.”<sup>13</sup> Family violence is defined<sup>14</sup> as:

- “(1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent, physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;
- (2) abuse, as that term is defined by Sections 261.001(1)(C)<sup>15</sup>, (E)<sup>16</sup>, and (G)<sup>17</sup> (Family Code) by a member of a family<sup>18</sup> or household<sup>19</sup> toward a child of the family or household; or
- (3) dating violence, as that term is defined by Section 71.0021.”<sup>20</sup>

Victims of sexual assault may also file for a sexual assault protective order.<sup>21</sup> If the court finds that there are “reasonable grounds to believe that the applicant is the victim of sexual assault, the court shall issue a protective order.”<sup>22</sup> “Sexual assault” uses the definition outlined in criminal code.<sup>23</sup>

“(a) A person commits an offense if the person:

- (1) intentionally or knowingly:
  - (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;
  - (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
  - (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;”

This report contains findings related to family violence and sexual assault protective orders. Other types of protective orders are available for victims of stalking and human trafficking, but are outside the scope of this project.

Attorneys and advocates who assist family violence and sexual assault survivors in Texas report discrepancies in the way protective orders are handled in different counties. Some of this is

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<sup>13</sup> Tex. Family Code Ann. Section 81.001 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>14</sup> Tex. Family Code Ann. Section 71.004 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>15</sup> Physical injury or the genuine threat of the same, that results in substantial harm to the child and does not reflect the explanation given

<sup>16</sup> Sexual contact harmful to a child’s mental, emotional or physical welfare

<sup>17</sup> Compelling or encouraging a child to engage in sexual conduct, including trafficking and prostitution crimes

<sup>18</sup> Defined as individuals related by consanguinity or affinity, former spouses, individuals with children in common, foster parent and foster child (Tex. Family Code Ann. Section 71.003 (O’Connor’s Texas Family Code Plus (2011-12))).

<sup>19</sup> Defined as a unit composed of persons living together in the same dwelling (Tex. Family Code Ann. Section 71.005 (O’Connor’s Texas Family Code Plus (2011-12))).

<sup>20</sup> Defined as people having or having had a continuing relationship of a romantic or intimate nature (Tex. Family Code Ann. Section 71.004 (O’Connor’s Texas Family Code Plus (2011-12))).

<sup>21</sup> Tex. Code Crim. Proced. Ann. Article 7A (O’Connor’s Texas Criminal Codes Plus (2011-12)).

<sup>22</sup> Tex. Code of Crim. Proced. Ann. Article 7A.03 (O’Connor’s Criminal Codes Plus (2011-12)).

<sup>23</sup> Tex. Penal Code Ann. Section 22.011 (O’Connor’s Texas Criminal Codes Plus (2011-12)).

inevitable due to intentionally vague language in statute which allows for judicial discretion. Prosecutors have discretion as well, to determine which facts constitute ones justifying a protective order application. However, this should not be confused with prosecutorial policies that systematically deny victims assistance in applying for protective orders. This is exemplified by local prosecutors whose unconditional policies require higher standards than those contained in statute. Examples of policies imposed by some prosecutors which systematically deny victims services include: requiring formal criminal charges to have been brought prior to the filing of an application for protective order; requiring a police report; denial of services related to child possession or support; denial of assistance in removing the batterer from the family residence; and denial of services if the violence, no matter how severe, was not within 30 days.

A more troubling policy in several jurisdictions is the complete absence of protective order services for victim of family violence and sexual assault. Although the Texas Legislature has granted prosecutors statutory authority to file protective orders on behalf of family violence and sexual assault victims,<sup>24</sup> some have completely abdicated this responsibility. The survey administrators were provided with different reasons for this, which are noted within this report.<sup>25</sup>

In response to the risk of further abuse for victims denied services by local prosecutors, and in the interest of access to justice, the Supreme Court of Texas unanimously adopted a “Pro Se Protective Order Kit,” available to the public for free online.<sup>26</sup> Pursuant to an order from the Supreme Court of Texas, use of these forms must be accepted in all courts state-wide,<sup>27</sup> which can be an advantage to victims who have been denied assistance from prosecutors. Of course, as the Supreme Court itself points out, the use of a pro se packet is not a substitute for representation by a qualified attorney. In addition to the procedural barriers the applicant must overcome, use of the pro se protective order packet requires that victims not only have access to a safe computer and printer, or transportation to a public location at which to do so, but the reading and writing proficiency necessary to complete the forms herself. The forms may be completed online and printed, but cannot be submitted electronically. Pending final approval from the Texas Supreme Court, the Pro Se Protective Order Kit was updated in 2012 in accordance with new legislation and is now available in English, Spanish and Vietnamese.

However, many counties have developed their own forms, which they prefer, or even require. In some cases, courts have refused to process the pro se kit forms, making victims redraft the paperwork. This is in direct conflict with a Texas Supreme Court Order.<sup>28</sup> This creates delay for victims who may have worked hard to justify to or act unseen by the abuser, obtain (usually unpaid) time off of work, find transportation and child care, and face other obstacles to getting to the courthouse. Further, completion of protective order forms can be overwhelming for victims working alone, who do not have expertise on exactly what types of information is needed to explain their need to the court. This can lead to applications which do not satisfy the local policies that prosecutors and courts arbitrarily set. Finally, continuing to write the story of their

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<sup>24</sup> Tex. Family Code Ann. Section 82.002 (O’Connor’s Texas Family Code Plus (2011-12)); Tex. Code of Crim. Proced. Ann. Article 7A.01 (O’Connor’s Texas Criminal Codes (2011-12)).

<sup>25</sup> *Infra*, page 10.

<sup>26</sup> [www.texaslawhelp.org](http://www.texaslawhelp.org).

<sup>27</sup> Misc.docket order 05-9059, <http://www.supreme.courts.state.tx.us/miscdocket/05/05905990.pdf>; and see [www.texaslawhelp.org](http://www.texaslawhelp.org)

<sup>28</sup> *Id.*

abuse can present emotional distress for victims forced to re-live their abuse and share personal information more than once. Assistance from District or County Attorneys, most of whom have victim assistance support staff, can help alleviate these problems

The protective order process in Texas requires that after the victim receives a protective order, the offender is served with all paperwork, including the victim's affidavit outlining the abuse.<sup>29</sup> A hearing must be set,<sup>30</sup> at which time the parties are allowed to present and refute evidence, either personally or through an attorney.<sup>31</sup> District or County Attorneys who assist victims with obtaining protective orders routinely represent the victims at this hearing. When this is not the case, victims must seek assistance elsewhere or face the offender alone, without an attorney, in open court which can be intimidating at best, unsafe at worst. Economic abuse often leaves family violence victims without financial means to hire a private attorney to represent them in the protective order hearing. This is particularly problematic in cases in which joint assets make finances appear sufficient to hire a private attorney, but the victim lacks access to the funds, either because the offender liquidated or drained the family's resources, or the court issued a financial injunction.

Victims who apply for legal assistance through one the Texas legal aid organizations face similar obstacles as those for services from local prosecutors. Legal aid agencies, because of funding levels, have resource limitations. Legal aid programs that receive state money administered through the Texas Access to Justice Foundation can only represent victims who earn less than 125% of federal poverty guidelines with those state resources. These guidelines allow \$11,170 annually for one person,<sup>32</sup> which equates to \$13,963 for one person. Victims with children get a minimal amount more. Federal legal services money allows legal aid attorneys to accept cases at 185% of the poverty level. Legal aid programs are also taxed in terms of number of attorneys, thus forcing them to set priorities in cases accepted. Although some legal aid offices prioritize clients who have been denied services for a protective order, others do not. Those legal aid offices which do assist victims of family violence and sexual assault have extremely limited resources and must evaluate applications comparatively. Often only the most extreme emergency custody or extreme physical violence cases are accepted for representation. This leaves many victims without emergency recourse. Texas' three legal aid programs serve 254 counties, with a state population of 25,674,681.<sup>33</sup> 17% of Texans live in poverty, and Texas is home to 4 of the 10 poorest counties in the nation.<sup>34</sup> Even if all of the legal aid providers in Texas were in agreement that victims of family violence and sexual assault should be prioritized, it is not possible for these organizations to fill a role granted to local prosecutors, given the current level of funding.

If a victim resides in a county in which the County and District Attorney either do not provide services or have policies in place which create undue burden on victims, they are left to proceed pro se (without the benefit of counsel), which puts them at a distinct disadvantage when the

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<sup>29</sup> Tex. Family Code Ann. Section 82.043(O'Connor's Texas Family Code Plus (2011-12)).

<sup>30</sup> Tex. Family Code Ann. Section 84.001 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>31</sup> Tex. Family Code Ann. Section 82.041 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>32</sup> *Federal Register*, Vol. 77, No. 17, pp. 4034-4035 (January 26, 2012).

<sup>33</sup> U.S. Census Bureau.

<sup>34</sup> U.S. Census Bureau data; U.S. Department of Commerce, Bureau of Economic Analysis.

offender is represented at the hearing. Defense attorneys have the advantage of being trained in legal skills not possessed by most lay people. Respondents commonly refute the abuse, or describe private, sometimes embarrassing incidents as if they were the victims. The true victim is allowed to be cross-examined on both the facts alleged and is left open to character attacks.

Civil protective orders are especially important safety measures for sexual assault victims in light of how seldom sexual assault is reported and successfully prosecuted.<sup>35</sup> The vast majority of sexual assault victims, whose rapists never receive criminal punishment, remain in danger. Nevertheless, many of the same obstacles faced by family violence victims, and some added burdens, persist.

Due to the severity of the offense (sexual assault is, at a minimum, a second degree felony in Texas<sup>36</sup>), prosecutors frequently offer criminal charges as the only appropriate response to sexual assault. Many prosecutors also worry that protective order hearings, in which victims testify on record and discovery rules apply, could give defendants unnecessary opportunities to examine evidence and elicit damaging admissions from state witnesses. As a result, sexual assault victims seeking protection frequently must choose between pursuing criminal charges with no-contact bond conditions placed on defendants, or no protective action by the prosecutor's office at all. Although applying bond conditions to a defendant can provide some degree of protection during criminal proceedings, those protections cease in the common event of a dismissal or acquittal. In contrast, sexual assault protective orders can last up to the lifetime of the applicant and respondent.<sup>37</sup> In addition, violating a bond condition does not allow an officer the option of immediate arrest available for protective order violations. Moreover, district or county attorneys' offices that do not request sexual assault protective orders prior to filing criminal charges may also decline to request them after criminal cases are dropped, often based solely on local policies.

The law allows sexual assault victims to apply for protective orders with the help of their own attorneys or pro se, but the economic and cultural access issues described above in the context of family violence apply with equal force to sexual assault victims. To issue a sexual assault protective order, a judge must find "reasonable grounds to believe the applicant is the victim of sexual assault."<sup>38</sup> Despite such a low standard of proof as "reasonable grounds," victims seeking protective orders and their attorneys often face onerous in-court examination and, unfortunately, stereotypes about victims' honesty and deservedness.

In light of these difficulties, some victims do not or are unable to appear at the hearing, the result often being that the protective order is denied or dismissed, and victims lack the protection they need. In some cases, this can be avoided if District or County Attorneys assist family violence or sexual assault victims with protective orders in consistent manners.

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<sup>35</sup> *A Health Survey of Texans, supra.*

<sup>36</sup> Tex. Pen. Code §§ 21.011, 21.021.

<sup>37</sup> Tex. Code Crim. Proc. Ann. Art. 7A.07 (O'Connor's Texas Criminal Codes Plus (2011-12)).

<sup>38</sup> Tex. Code Crim. Proc. Ann. Art. 7A.03 (O'Connor's Texas Criminal Codes Plus (2011-12)).

## Methodology

This joint venture of the Texas Council on Family Violence (TCFV), the Texas Association Against Sexual Assault (TAASA), Texas RioGrande Legal Aid (TRLA), and the Texas Advocacy project (TAP) was conducted through telephonic interviews and written communication with representatives from all of the District and County Attorneys' offices across Texas. A common script was used by all survey administrators, a copy of which is included as an appendix to this report. Several calls were made to each agency, in an attempt to receive the most complete data as possible. Contacts were first made with County Attorneys' offices, since those agencies most routinely assist with protective orders. In counties in which the District Attorneys' offices handled protective orders, contacts were made with that agency. A person from each county's relative office who self-identified as having the most knowledge about their office's policies on protective orders was asked a number of questions about family violence, teen and sexual assault protective orders. These questions are also included as an appendix to this report. If the staff member contacted felt uncomfortable providing information on behalf of their agency, referral information was obtained, and that person was then contacted. Information collected by each survey administrator was logged in a collective database. These responses are also attached as an appendix of supporting material.

Telephonic contact was attempted with each county in Texas. After the data was collected from each participating agency, a letter was sent containing the reported information and the contact who provided the same. If no telephonic contact had been made, this letter was still sent, which served as an opportunity to provide initial information. An opportunity for additions or corrections was then provided, with a time frame of thirty days. A number of agencies responded with additional information. A second letter was then sent to each agency, containing information provided, with a deadline of fourteen days, indicating that it was the final opportunity to answer. We accepted responses for one month after that deadline. Information was received from 229 of Texas' 254 counties. Those agencies that did not respond are noted in the county-by-county chart in the supporting material. Collection and analysis was made and the graphs in this report were developed. Additional information and comments from prosecutors' offices are contained in the narrative.

In addition to drastically different policies, counties vary as to whether the county or district attorney handles protective orders.

In an effort to provide the most useful and relevant information the data contained herein was not separated based on whether the county or district attorney is responsible for protective orders in their jurisdiction but rather what resources and policies exist in each county in Texas.

TCFV, TAASA, TRLA, and TAP, hereinafter the "survey administrators" worked collaboratively to develop and conduct this survey of County and District Attorneys state-wide to determine each county's policies on protective orders.

Each question's finding first outlines Texas laws on the issue,<sup>39</sup> followed by charts of the answers provided to each question. Additional responses and clarifications offered by the people answering are contained in narrative form. This report contains as an addendum a chart of complete responses received for each question, categorized alphabetically by county. The findings of this project demonstrate a great variance as to how and under what circumstances protective order assistance is provided to applicants, and what conditions of relief are sought. This results in significant challenges for victims seeking safety through the justice system. The discussion provides considerations that prosecutors may wish to explore when reviewing their current policies on protective orders, to better provide family violence or sexual assault victims' the relief that should be available to them through protective orders.

The survey responses were fit into "yes" or "no" categories as much as possible without subjective interpretation. If the answer was qualified or conditional, that was noted in the narrative's response/clarification section. If the response did not fit into either category, it will be shown as "other." A description of those answers is also outlined in the narrative. Many of the "other" responses were repeated several times by different offices. All comments are recorded in the first person for consistency. It should be noted that each question also contains a category of "no response." The primary reason for the high number of such answers was allowing participants to respond that they did not know the answer.

Participants were asked a total of thirteen questions which were developed by the survey administrators after consultation with sexual assault and family violence program advocates, attorneys, and victims throughout the state of Texas. Technical assistance requests from criminal justice system officials also informed the development of questions. Four of the questions involved sexual assault protective orders, seven were regarding family violence orders, one requested information on protective orders for teens and one question asked about language access for victims.

Screening Tool for Sexual Assault Protective Orders:

1. Does your agency assist with sexual assault protective order applications?
2. Does your agency require a police report for sexual assault protective orders?
3. Does your agency assist with a sexual assault protective order if there is an active criminal case?
4. Has your agency ever prosecuted a violation of a sexual assault protective order?

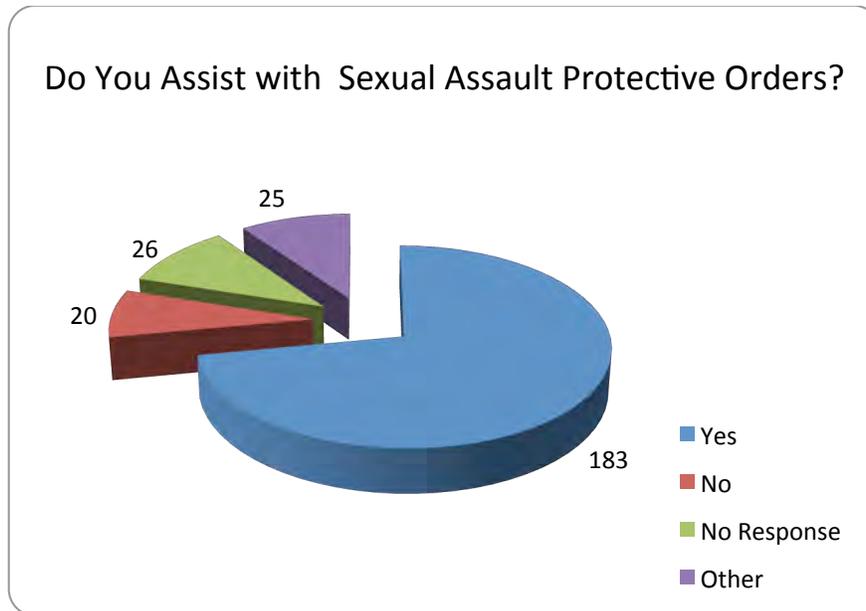
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<sup>39</sup> All citations to the Family Code are to O'Connor's Texas Family Code Plus (2011-12). All citations to the Criminal Code and Penal Code are to O'Connor's Texas Criminal Codes Plus (2011-12). All citations to the Government Code are to the Government Code section of O'Connor's Texas Family Code Plus (2011-12).

## Findings

### QUESTION: Does your agency assist with sexual assault protective orders?

A prosecutor may apply for a protective order on behalf of a victim of sexual assault, but it is not mandatory that they do so.<sup>40</sup> Some reporting county attorney offices deferred to the district attorney as the department in their community which handles such cases, and vice versa. The agency tasked in each county with filing protective orders was contacted for information. This graph demonstrates in how many counties a prosecutor provides assistance in this area.



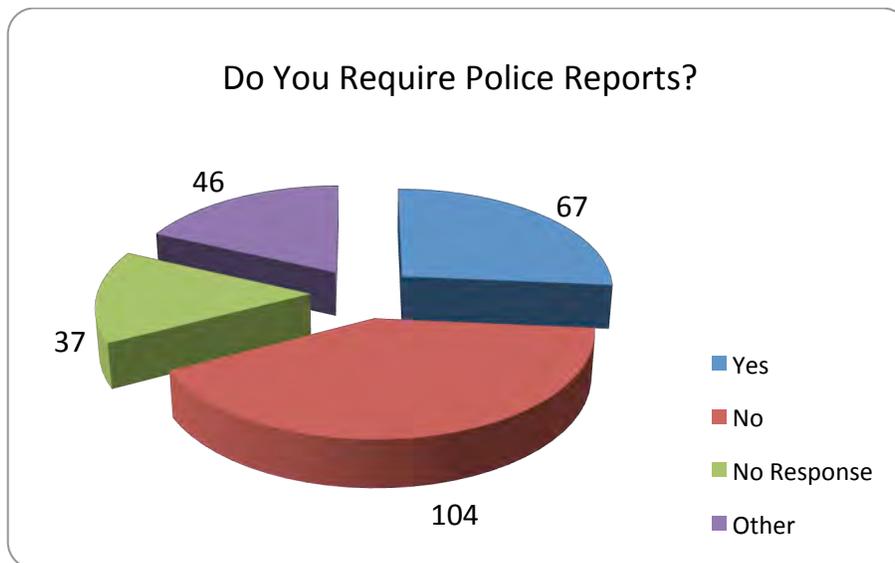
“Other” responses/clarifications included:

- The other prosecuting office requested that we not do sexual assault protective orders.
- I refer all protective orders to legal aid.
- I am willing, but have never done one.
- I was not aware they existed. They are usually covered under family violence protective orders, but I would do one if it came up and if the code provided for it.
- No one has ever applied.
- I probably would but it has never come up.
- Rarely. I have had a couple applications, but in court it’s detrimental because it could provide too much evidence for ongoing criminal investigation; respondent will never agree. What I do instead is seek bond conditions that provide the same safety measures.
- The interviewer was told by one prosecutor that sexual assault protective orders "don’t exist." The person interviewed stated this more than once in the course of the interview.

<sup>40</sup> Tex. Code Crim. Proc. Ann. Article 7A.01 (O’Connor’s Texas Criminal Codes Plus (2011-12)).

QUESTION: Does your agency require a police report for sexual assault protective orders?

In Texas, the existence of a police report is not required to file a sexual assault protective order. “If the court finds reasonable grounds to believe that the applicant is the victim of sexual assault, the court shall issue a protective order...”<sup>41</sup> Thus any requirement of a police report before a sexual assault protective order can be filed is a matter of policy within a particular prosecutor’s office.



“Other” responses/clarifications included:

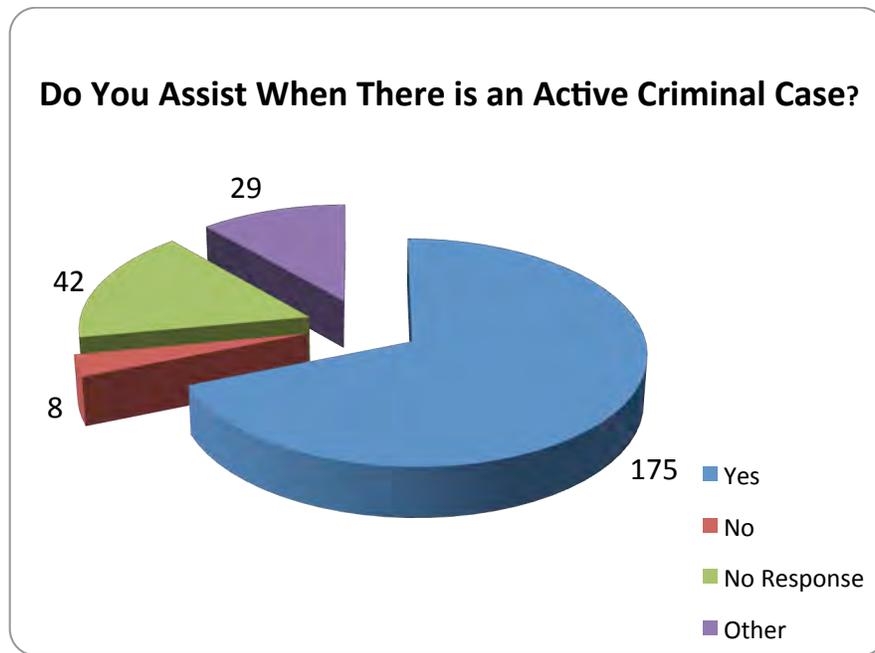
- No, but they are recommended.
- It is a case by case (determination).
- If they do not have one, they are sent to make a report.
- Yes, or they can file on their own.
- The ones that I’ve done both had police reports. I’m not sure if it's required.
- Yes, and usually a “S.A.N.E.” (sexual assault nurse practitioner) exam.
- I am unsure, because I have never done one.
- We only do EPO (MOEP – magistrate’s order for emergency protection), so a police report would have been filed.

QUESTION: Does your agency assist with a sexual assault protective order if there is an active criminal case?

Under Texas law, the existence of a criminal case in any stage does not reflect upon whether or not a sexual assault protective order can be filed. “If the court finds reasonable grounds to believe that the applicant is the victim of sexual assault, the court shall issue a protective order...”<sup>42</sup> Thus any requirement regarding an active criminal case when a protective order case can be filed is a matter of policy within a particular prosecutor’s office.

<sup>41</sup> Tex. Code of Crim. Proced. Ann. (O’Connor’s Texas Criminal Codes Plus (2011-12)).

<sup>42</sup> Tex. Code of Crim. Proced. Ann. (O’Connor’s Texas Criminal Codes Plus (2011-12)).



“Other” responses/clarifications included:

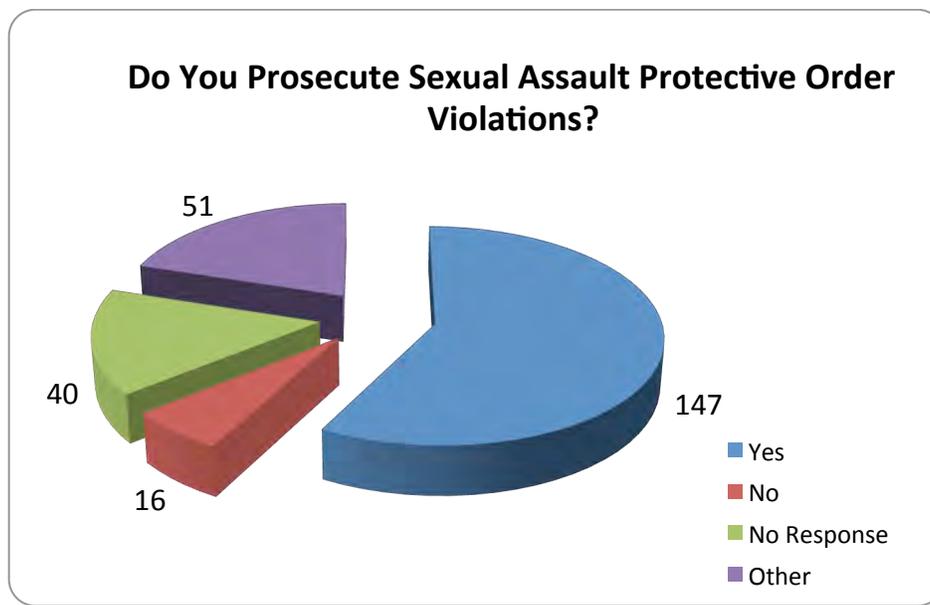
- It hasn't come up yet.
- I haven't had one in a long time, “they are” good at following the law, so it is rare.
- Not if there is a conflict.
- Yes, if pending investigation.
- Yes, if necessary.
- Not if the petitioner has an open file.
- If there is not an active criminal case in their jurisdiction, getting a protective order is more complex, but the county investigator works on proving up facts to justify getting a protective order.
- If there are extenuating circumstances.

QUESTION: Has your agency ever prosecuted a violation of a sexual assault protective order?

Violation of sexual assault protective order is a Class A misdemeanor,<sup>43</sup> subject to a penalty of up to one year in jail, a fine not to exceed \$4,000 or both.<sup>44</sup> In addition to determining whether or not a violation is filed, this range also provides prosecutors discretion as to what sentence is recommended to the court.

<sup>43</sup> Tex. Penal Code Ann. Section 38.112 (O'Connor's Texas Criminal Codes Plus (2011-12)).

<sup>44</sup> Tex. Penal Code Ann. Section 12.21 (O'Connor's Texas Criminal Codes Plus (2011-12)).



“Other” responses/clarifications included:

- I am not sure. I don’t know if a violation is a felony.
- I don’t know. It has never come up.
- Yes if it is a felony. No if it is a misdemeanor.

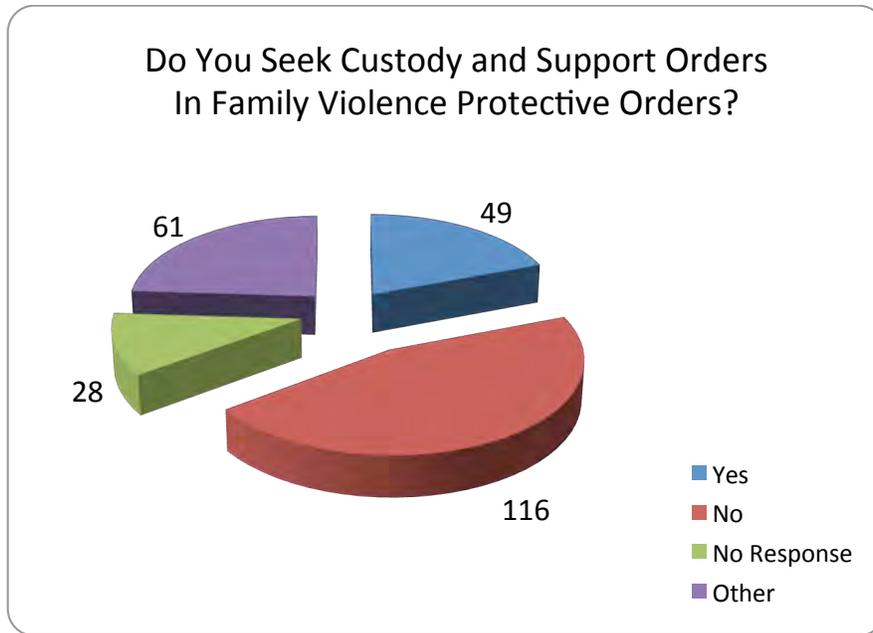
#### Screening Tool for Family Violence Protective Orders:

1. Does your agency seek custody and child support in protective orders?
2. Does your agency seek “kick out” orders to remove the respondent from the residence when there is violence within 30 days?
3. Does your agency seek a “finding of family violence” in all protective orders?
4. Does your agency require “recency” of the violence and if so, how is that defined?
5. Is a police report required for your agency to file a family violence protective order?
6. Is the prosecution of the batterer required for your agency to seek a protective order?
7. Does your agency seek extensions of protective orders when the batterer is incarcerated?

QUESTION: Does your agency seek custody and child support in protective orders?

Among relief available for an applicant in a protective order is the establishment of custody and child support.<sup>45</sup> This relief is discretionary with the court, upon request of the applicant.

<sup>45</sup> Tex. Family Code Ann. Section 85.021 (O’Connor’s Texas Family Code Plus (2011-12)).

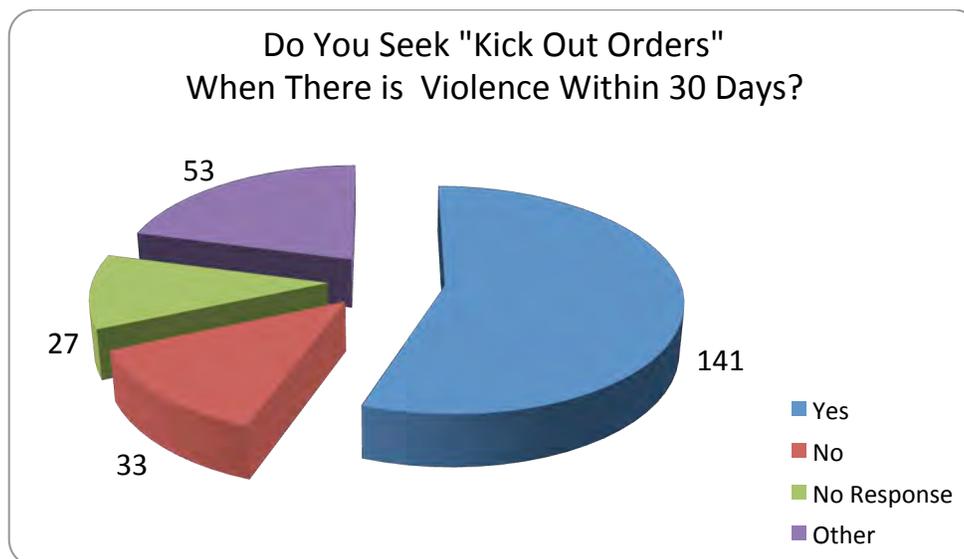


“Other” response/clarifications included:

- I occasionally recommend that they seek it through a family law attorney.
- Child support no. Custody sort of, but there is not a full hearing.
- Only if there is abuse of the children.
- I refer them to a private attorney or legal aid.
- No, because we have a non-lawyer county judge.
- I try not to get involved but sometimes I need to get them as part of the protection order.
- Not at this time, but I would include the child in the order and might prohibit the other party from taking the child.
- Yes, with some physical violence.
- No, but I am looking at adding that.
- I usually need for those issues to be resolved first, but sometimes they may be involved in the protective order.
- This is an ancillary issue. If I have to, I will do it but it is not my primary goal.
- No, this is a separate issue. If the children are in danger they can be covered in a protective order also.
- I have included this language on occasion, but do not generally include child support and visitation as part of the protective order. I will get CPS involved if the kids are in danger.
- Generally no, but in some particularly bad situations.
- This is inappropriate due to other representation.
- No. I try to stay out of child support and custody issues but will include language in that nothing in the order is to be construed to prevent the district court from ordering its own custody and visitation.
- No. I fear ending up in family court or having her recant during a divorce.
- No child support. I will include denial of possession and access and a very abbreviated visitation schedule.

QUESTION: Does your agency seek exclusion (“kick out”) orders to remove the respondent from the residence when there is violence within 30 days?

A court may enter an order excluding the respondent of a protective order from the residence, if based upon the affidavit and testimony of the victim, the court finds that: the victim lives or lived at the residence within thirty days prior to the petition; the respondent committed family violence against the victim within thirty days prior; and there is a clear and present danger of further violence.<sup>46</sup> Law enforcement may accompany a victim to the residence to provide physical safety<sup>47</sup> and ensure that the respondent follows a final order to vacate the property.<sup>48</sup> If the respondent refuses to do so, law enforcement may “remove the respondent from the residence; and arrest the respondent for violating the court order.”<sup>49</sup>



“Other” responses/clarifications included:

- Yes, but there isn’t a day requirement.
- No. When the officer responds on the scene he will deal with that.
- It has never come up.
- I haven’t had to. I don’t know if I can legally.
- Yes, but they are rarely necessary.
- I try not to get involved.
- I must have judgment of a court order saying it is family violence before taking action. I cannot do it on speculation.
- No. When the protection order is issued the batterer is supposed to leave or not have contact with the victim if she moves out anyway.
- Yes, although the judges are reluctant to do them. Generally the final hearing is scheduled quickly and exclusion from the residence is ordered there.

<sup>46</sup> Tex. Family Code Ann. Section 83.006 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>47</sup> Tex. Family Code Ann. Sections 86.003 and 86.004 (O’Connor’s Texas Family Code Plus (2011-12)).

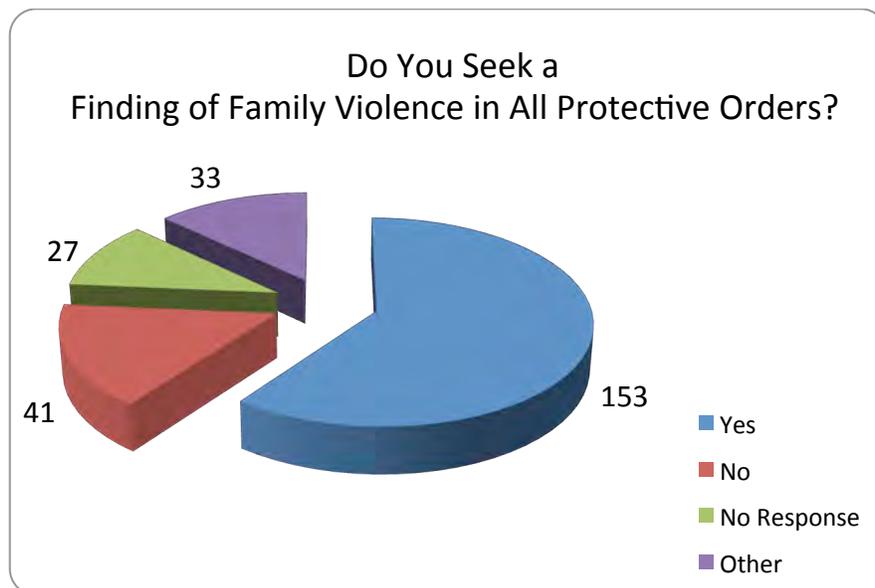
<sup>48</sup> Tex. Family Code Ann. Section 86.004 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>49</sup> Tex. Family Code Ann. Section 86.004 (O’Connor’s Texas Family Code Plus (2011-12)).

- I am not opposed to it.
- The violence should have been in the previous 72 hours.
- Yes, in the final order, not the temporary.
- No law provides for this.

QUESTION: Does your agency seek a “finding of family violence” in all protective orders?

Judges hearing family violence protective orders shall, at the close of the hearing, make a finding that family violence has occurred and is likely to occur in the future.<sup>50</sup> If the court makes such a finding, it shall enter a protective order.<sup>51</sup>



“Other” responses/clarifications included:

- The prosecutor asked the interviewer “Are you serious?” He asked if all of the questions were that "silly" and said that he "had better things to do" and that this was a “waste of (his) time."
- Yes, but sometimes it is negotiated.
- Yes, but sometimes the judge removes it.
- It has been difficult. Respondents are finding it, getting into an agreed order situation. I am always clear to clients about what that means.
- I can allow parties to agree that "statutory prerequisites have occurred" instead of a finding of family violence.
- Only if the judge deems it so.
- No. If the applicant is afraid or fearful that violence will occur again, especially if there is a history, that is sufficient.
- Yes. There must be some form of harassment, not necessarily bodily injury.

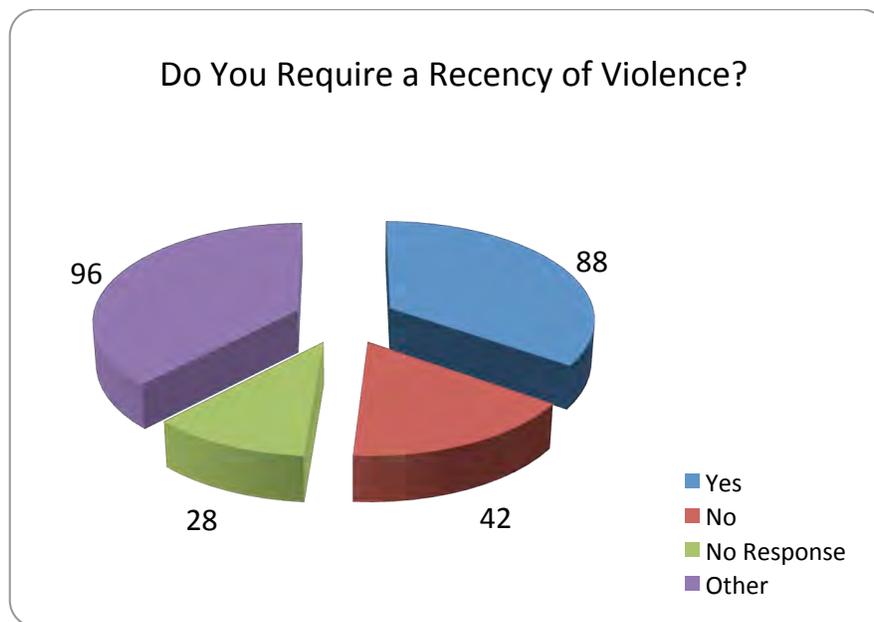
<sup>50</sup> Tex. Family Code Ann. Section 85.001 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>51</sup> *Id.*

- Yes, if I have a strong suspicion that there have been threats or there is a history of family violence.
- Yes, if there is physical violence or the threat to kill.
- Yes. It can't be a protective order without a finding.
- If it is agreed, no. If it is contested and I prevail, always.

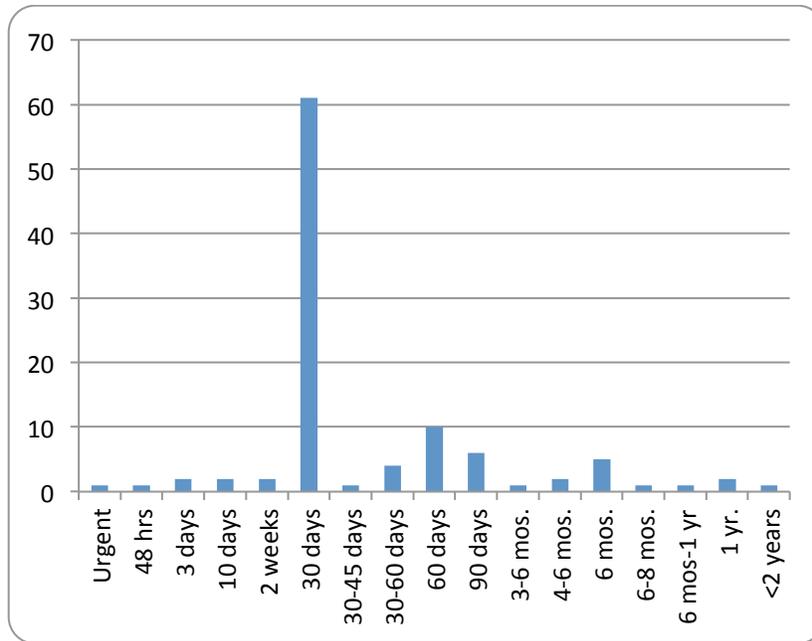
QUESTION: Does your agency require “recency” of the violence and if so, how is that defined?

In an application for an ex parte protective order, the first step in the protective order process, the request must contain “a detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective order” signed under oath by the applicant that the facts contained therein are “true to the best of the knowledge and belief of each applicant.”<sup>52</sup> No requirement concerning the length of time that passed since the violence is noted. In fact, according to Texas case law, “Oftentimes, past is prologue; therefore, past violent conduct can be competent evidence which is legally and factually sufficient to sustain the award of a protective order.”<sup>53</sup> Nonetheless, most prosecutors’ offices have set a recency requirement that must be met before a protective order will be filed by their office.



<sup>52</sup> Tex. Family Code Ann. Section 82.009 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>53</sup> *Johnson v. Johnson*, (Tex. App. - Corpus Christi-Edinburg, 13-12-00080 – CV, Austin 16, 2012, quoting *In re Epperson*, 213 S.W.3<sup>rd</sup> 541, 544 (Tex.App – Texarkana 2007, no pet.).



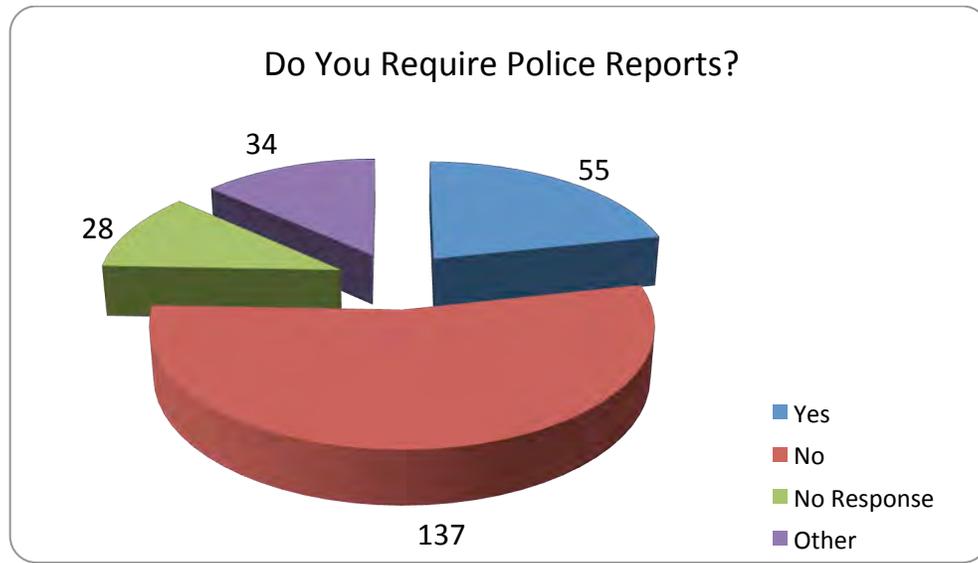
“Other” responses/clarifications included:

- No, I am flexible and will look at all factors and evidence.
- I have no requirement, but it must be recent violence with the threat of more.
- It depends on what's happened most recently. It fluctuates. I like it to be a month.
- On a case by case basis.
- 6 months. It is necessary to show it is likely to occur again.
- No, as long as the abuser is still being held on that charge.
- Within the last 90 days will fare best in court, but there is no set requirement.
- The incident must have occurred in the last 30 days, with at least 2 occurrences of violence or threats.
- If there is no arrest, I cannot assist, so I usually see the victims within a few days of the violence.
- Yes, it needs to be urgent, for example if it just occurred.
- Yes, it is a case by case basis - around a couple of weeks.
- I prefer something more recent to show what the motivation is for the protective order, but it isn't absolute.
- They can apply regardless, but there is a better chance if there is recent family violence.
- I prefer 30 days but use my discretion if they haven't been able to get away.
- Yes, it needs to be recent. There is no need for a protective order if the perpetrator is incarcerated or has had no contact in 6 months.

QUESTION: Is a police report required for your agency to file a family violence protective order?

There is no provision under Texas law that requires the existence of a police report to file a family violence protective order. A prosecutor’s decision to file a family violence protective

order “should be made without regard to whether a criminal complaint has been filed by the applicant. A prosecuting attorney may require the applicant to provide information for an offense report, relating to the facts alleged in the application, with a local law enforcement agency.”<sup>54</sup> Thus, any set requirement for a police report is a matter of policy within a particular prosecutor’s office.



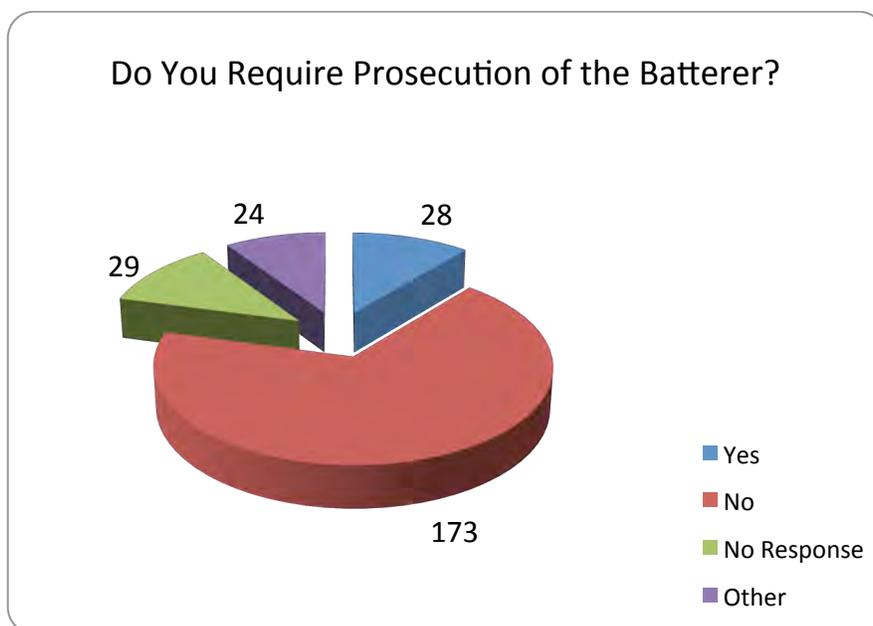
“Other” responses/clarifications included:

- Yes. There are a lot of emergency orders issued but not many protective orders issued because as a term of bond, if the offender makes contact with the victim, the offender violates the condition of bond which is a Third Degree felony.
- Yes. Protective orders are being used as leverage in civil cases such as disputed child custody cases.
- No, but it is encouraged.
- Yes, however, our county has fewer than 400 residents and I have not done a protective order in the last 10 years.
- Not police reports, but I do require a statement be given to the sheriff’s office.
- I usually require police report, not always, but especially if the victim does not want to follow through on charges.
- Yes. The judge wants a report before an order will be issued.

QUESTION: Is the prosecution of the batterer required for your agency to seek a protective order?

Under Texas law, the existence of a criminal case in any stage is not required to file a family violence protective order. Thus, any requirement thereof is a matter of policy within a particular prosecutor’s office.

<sup>54</sup> Tex. Code Crim. Proc. Ann. Article 5.06 (O’Connor’s Texas Criminal Codes Plus (2011-12)).



“Other” responses/clarifications included:

- Yes, because if they don’t, they can’t get crime victims’ compensation.
- No, but the victim must be willing to assist in prosecution
- Yes, on the most recent incident.
- It is preferred because it can help in the protective order case to show the Judge.
- Yes, if I have jurisdiction.

QUESTION: Does your agency seek extensions of protective orders when the batterer is incarcerated?

If a protective order expires while the respondent is incarcerated, the order is automatically extended by one year.<sup>55</sup> No separate order is required by statute, but a new order would give notice to law enforcement. Law enforcement is charged with entering all protective orders into a “statewide law enforcement information system maintained by the Department of Public Safety within ten days of receiving the order from the court clerk.<sup>56</sup> In Texas, this system is called the Texas Crime Information Center (“TCIC”). “The Texas Crime Information Center (TCIC) provides immediate access 24 hours a day, 7 days a week to law enforcement agencies throughout the state to data regarding...protective order status of persons. TCIC is accessed via the Texas Law Enforcement Telecommunications System (TLETS) resulting in responses within twelve seconds to inquiries from police departments, sheriffs’ offices, and other criminal justice users. TCIC also provides a direct link to the NCIC so that law enforcement officers throughout Texas know instantly...a person in question is wanted anywhere in the country.<sup>57</sup> Without

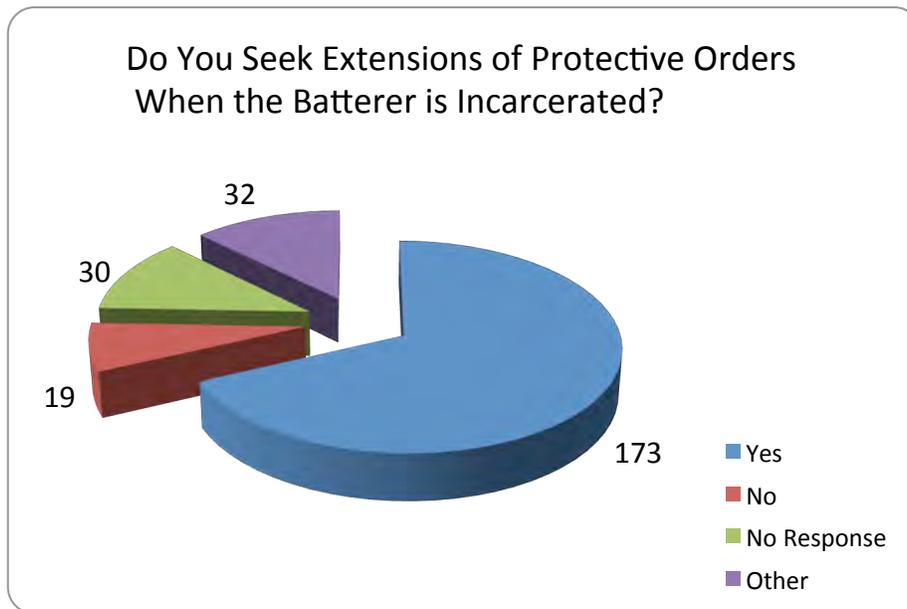
<sup>55</sup> Tex. Family Code Ann. Section 85.025 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>56</sup> Tex. Family Code Ann. Section 86.0011 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>57</sup> Texas Department of Public Safety, 2010-11.

([www.txdps.state.tx.us/administration/crime\\_records/tcic/index.htm](http://www.txdps.state.tx.us/administration/crime_records/tcic/index.htm).)

notice in TCIC, law enforcement does not have current expiration data to enforce the extended order.



“Other” response/clarifications included:

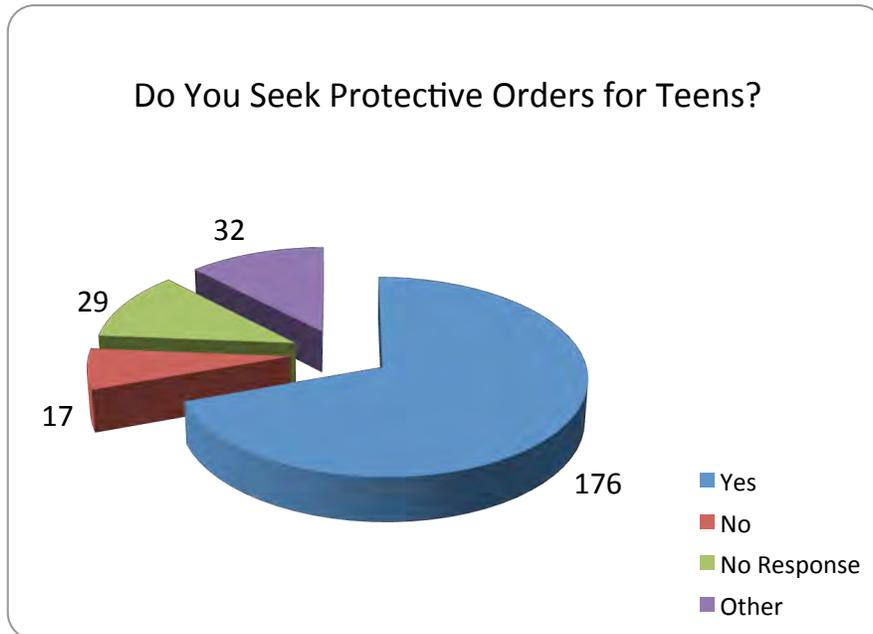
- Yes, if parole or release is scheduled.
- Not usually.
- It hasn't come up.
- I had a request but it fell through.
- Only if there has been a new incident.
- I let victims know it is available. When victims are proactive I will do an extension. I put it in the protective order that it automatically extends if the respondent is incarcerated.
- I haven't done it but I would if someone was being harassed while the respondent was incarcerated.
- It depends on the situation.
- It is up to the district judge if (she/he) feels the victim is still in danger.
- No one has ever asked.
- It is a judgment call.

### Screening Tool for Teen Protective Orders

Does your agency file protective orders for teens?

In the 82<sup>nd</sup> session of the Texas legislature, a bill was passed, effective September 1, 2011, which states that any victim of dating violence may file for a family violence protective order,

regardless of whether the applicant is a an adult or a minor.<sup>58</sup> Dating violence is included in the definition of family violence in Texas.<sup>59</sup>



“Other” responses/clarifications included:

- Yes, but it hasn’t come up.
- I will file them in care of an adult.
- Yes, but the parents must apply on their behalf.
- Yes, but I need the cooperation of a guardian/parent.
- I will include children of a mother seeking a protective order, not the teen on their own.
- Yes, with the parent as the applicant.
- Yes, but we need to see if they are married, emancipated, or if they need a parent's help, or juvenile probation.
- Yes, for parents filing on behalf of teenagers, and sometimes when a teen files, but I don’t know about protective orders against a teenager.
- I don’t do one for teens because you can’t get a protective order for dating violence in Texas.

<sup>58</sup> SB 819, 82<sup>nd</sup> Texas Legislature, amending Tex. Family Code Ann. Section 82.002 (O’Connor’s Texas Family Code Plus (2011-12)).

<sup>59</sup>Tex. Family Code Ann. Section 71.004 (O’Connor’s Texas Family Code Plus (2011-12)).

## Screening Tool for Language Access

What language resources are provided for parties who have limited English proficiency?

A protective order applicant is entitled by law to a free, certified court interpreter. This right has been codified in both Texas and federal law. National origin discrimination is prohibited by recipients of federal funds, which includes Texas courts. Disparate treatment based on a person's inability to speak English may be included in this category.<sup>60</sup> A court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the courts.<sup>61</sup> An applicant may not be assessed with fees in connection with the filing, servicing or entering protective orders or "a fee for any other service related to a protective order" including interpretation fees.<sup>62</sup> Recipients of federal funding must provide meaningful access to the courts for persons with Limited English Proficiency ("LEP"). To comply with Title VI of the Civil Rights Act a plan must be developed for effectively serving survivors with LEP.<sup>63</sup>

The answers to this question were too varied for a graphical representation to be useful, so representative answers are being relayed here in commentary response form:

- I use a certified court interpreter, whose fees are paid by the county.
- I use a bi-lingual family member.
- I use court staff.
- I use advocates from the local family violence program.
- I have an interpreter at the courthouse.
- I request that the victim to provide her own.
- None. I don't have many non-English speaking applicants.
- Yes, I'll find interpreters. I haven't had to pay anyone so far—I have had volunteers.
- They'll figure it out - his wife can speak Spanish.
- I will use a Spanish-speaking employee or language line. The county will pay for the interpreter.
- The forms are printed in English and Spanish and the applicants get assistance in translating Spanish.
- All support staff speaks Spanish.
- I am bilingual, and pay if a phone service is necessary.
- We have ESL (English as a Second Language) people who work in the courthouse to translate at no cost and the judge is fluent in Spanish.
- There are enough Hispanic people around to take care of it.
- The Texas Remote Interpreter Program (TRIP)<sup>64</sup> is sometimes utilized.

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<sup>60</sup> Title VI of the Civil Rights Act of 1964.

<sup>61</sup> Tex. Gov't Code Ann. Section 57.002 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>62</sup> Tex. Family Code Ann. Section 81.002 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>63</sup> Executive Order 13166, issued by President Clinton (2000).

<sup>64</sup> <http://www.txcourts.gov/oca/DVRA/trip.asp>

- County employees are bilingual. I do not know who would interpret or pay the cost if we needed to hire an interpreter.
- I do not have anyone in the office but Sheriff's deputies can help, or they are encouraged to bring a friend.
- I hire a translator, or the court does, and the cost can be included in the court costs to the respondent.
- I use interpreters through the probation office.
- I would call a person in the community who can translate. The judge has a list of translators.
- Most attorneys are bi-lingual.
- The victim will bring a family member to translate for them and the county pays for the interpreter.
- I speak a little Espanola. There are people here who speak Spanish. We all get along.
- A woman in the Tax Office is fluent in Spanish. She may help me with a Spanish speaking victim. The closest certified translator is 70 miles away. The county pays for the translator in the protective order hearing.
- I get someone from another office.
- One client had a friend who provided excellent translation, so we often turn to her for help. There is also a county interpreter.
- Spanish speakers usually bring their own interpreter. There are a few Hispanics in my county but the population is increasing. The office of the justice of the peace has a staff member who is fluent that I can turn to.
- I do not provide an interpreter.

## **Discussion**

One question raised before this survey was conducted was whether fewer resources in rural counties results in more barriers to victims applying for protective orders. To address this question, counties were classified as either urban or rural, based on the Texas Department of State Health Services' guidelines. An urban county has a core population of 50,000 people or more, and a rural county is one with less than 50,000. There are 175 rural counties and 79 urban counties in Texas.<sup>65</sup> The data obtained from this research project does not reflect a marked difference between urban versus rural areas. The responses demonstrate that attitudes and policies of prosecutors are not affected by the population of the county. Further, even among urban areas, policies varied significantly. All of this information can be seen in the county-by-county results contained in the appendices.

This report has outlined Texas laws and prosecutorial policies involving protective orders. The goal is that the results of this study will cause district and county attorneys to review and assess their practices surrounding protective orders to maximize victim safety. A review of the chart attached hereto can give prosecutors references to contact should they want more information from a county whose policy they wish to implement. In making such a determination, a few key considerations should be taken into account:

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<sup>65</sup> Texas Department of State Health Services' population data, based on 2010 census, updated February 2012.

**Whether your office files protective orders:** National studies indicate that approximately 86% of the women who received a protection order report that the abuse either stopped or was greatly reduced.<sup>66</sup> While protective orders are not a safe option for every victim, she is the ultimate experts in how to keep herself and her children safe, and her decisions must be respected. If, after being fully and fairly advised about the benefits and risks of protective orders, a victim chooses to apply for a protective order, that option must exist. If prosecutors do not file for orders as a matter of practice, or establish policies which inhibit victims from obtaining them protection without legal representation and support, legitimate access to the courts is denied and victims' safety significantly compromised.

**Whether your office requires police reports or criminal charges:** A victim may choose to access the legal system in many different ways. Statistics show that an abuser will hit their partner an average of 35 times before police are notified for the first time.<sup>67</sup> Involving the police has many implications, all of which must be weighed by the victim before deciding whether and how to look to the system for safety. Considerations about economics, culture, legal status, and issues relating to having children in common with the respondent are difficult to balance. Fear of the batterer's response must be addressed first and foremost. One government-funded survey found that fear of reprisal by the perpetrator made up 19% of the reasons females did not report their victimization to the police.<sup>68</sup> If the victim determines that a protective order will help secure her safety but law enforcement involvement will endanger her and her children, she should not be forced to call the police. It is also common for the victim to have a number of misconceptions about the system and how it can help stop the violence. An open, safe discussion about the possible advantages, options and repercussions of involving the criminal justice system can help victims make informed choices and may lead to increase offender accountability.

**Whether your office will assist with protective orders when the victim has an active criminal case:** Many prosecutors' offices prefer to use bond conditions to provide for the safety of sexual assault victims. Yet a victim has a right to the stronger protections offered by protective orders. Unlike bond conditions:

- Protective orders are entered into TCIC where law enforcement can access them at anytime for enforcement purposes.
- Protective orders extend past the criminal case.
- Protective orders can be for life.
- Protective orders automatically extend until 1 year after someone has been discharged.
- Protective orders are transferable and enforceable from state to state.
- Victims must by law receive copies of their protective order.
- Protective orders cannot be modified without a hearing with the victim present.

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<sup>66</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response* (1999), (reviewed in Meda Chesney-Lind, James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response*, 35 Crime, L. & Soc. Change 363 (2001)).

<sup>67</sup> Bureau of Justice Statistics Crime Data Brief (February 2003).

<sup>68</sup> Matthew R. Durose et al., Dep't of Just., NCJ 207846, Bureau of Justice Statistics, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances* at 2 (2005); Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Just., NCJ 178247, Bureau of Justice Statistics *Special Report: Intimate Partner Violence* at 1, 7 (2000).

Prosecutors generally have concerns about filing for a protective order while a criminal case is underway because the protective order hearing is similar to an evidentiary hearing. These prosecutors say that the defense could get look at the strength of the prosecutor's case and there is a chance the victims testimony will not be completely consistent, making the prosecution more difficult. However, the evidence typically utilized in a protective order hearing (affidavit, police report and/or medical records) is basic enough that the defense will most likely already have it or will get before trial. Combined with the lower burden of proof required for sexual assault protective orders ("reasonable grounds"<sup>69</sup>) there is good reason to strongly consider assisting sexual assault victims to apply for sexual assault protective orders.

**Whether your office seeks possession and access to and support for children in protective orders:** In one recent study, 82% of urban and 52% of rural women applying for protective orders reported being somewhat or extremely fearful of future harm through interference or harm to their children before obtaining the order. Six months after an order was in place, the numbers dropped to 59% for urban and 39% for rural victims.<sup>70</sup> In addition to offering direct and immediate safety to the victim, the establishment of child custody in a protective order can play a significant role in establishing possession of and access to children in a divorce or custody action. Texas has a presumption that joint custody is in the best interest of the children. However, this presumption is rebutted by a history and pattern of family violence.<sup>71</sup> Specifically, a court shall consider evidence of family violence within two years prior to filing the action in determining who shall be appointed as a sole or joint conservator.<sup>72</sup> Further, a court may not allow a parent to have access to a child if there is a history or pattern of abuse within two years prior, unless it is in the best interest of the child and safety provisions can be included in the order.<sup>73</sup> While the existence of a protective order is not required for this finding it can serve as proof thereof. Additionally, courts presiding over dissolution cases must also oversee the protective order case,<sup>74</sup> which gives the court more complete information in determining possession and access, sometimes as well as support. When the court can have a full hearing, these issues can be revisited, but inclusion of such provisions in protective orders addresses the victim's basic needs for safety in a time of crisis.

A protective order may be the victim's only recourse to obtain support for her children. In a recent study also noted above, 74% of urban and 59% of rural women applying for protective orders reported being somewhat or extremely fearful of future harm through financial abuse before obtaining the order. Six months after an order was in place, the numbers dropped to 48% for urban and 21% for rural victims.<sup>75</sup> Studies have repeatedly found that economic independence is one of the strongest factors tying a family violence victim to her abuser, forcing her to choose to stay in a violent relationship or face significant financial hardship or even homelessness. One often-cited study found that 92% of homeless women have experienced

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<sup>69</sup> Tex. Code of Crim. Proc. Article 7A.03 (O'Connor's Texas Criminal Codes Plus (2011-12)).

<sup>70</sup> *Perspectives on Civil Protective Orders in Domestic Violence Cases: The Rural and Urban Divide*, National Institute of Justice (May 2010).

<sup>71</sup> Tex. Family Code Ann. Section 153.101 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>72</sup> Tex. Family Code Ann. Section 153.004 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>73</sup> *Id.*

<sup>74</sup> Tex. Family Code Ann. Sections 85.004, 85.061-85.965 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>75</sup> *Perspectives on Civil Protective Orders in Domestic Violence Cases: The Rural and Urban Divide*, National Institute of Justice (May 2010).

severe physical or sexual abuse at some point in their lives, and 63% have been victims of family violence as adults.<sup>76</sup> A more recent study indicates that 92% of homeless women with children likewise reported being victims of family violence.<sup>77</sup> Access to immediate, affordable and holistic civil legal protection is a key, often outcome determinative, factor with regard to whether a victim will permanently break the cycle of violence.<sup>78</sup>

**Whether your office requests exclusion orders:** Exclusion orders provide housing for the victim and her children, when other housing or shelter is not an alternative provided to or wanted by the victim. It also reinforces the message that the violence is not the victim's fault and she should not be required to make further accommodations as a result of the abuse. Allowing the victim to stay in the home grants her the ability to protect the property of her and her children. Legal residence in the family home also assists with violation of protective order arrests and prosecution, as protective orders may include a provision that the offender must stay away from a certain location, including the victim's home.<sup>79</sup> Further, it provides prosecutors with a current address at which to contact the victim for court purposes.

**Whether your office seeks a finding of family violence in all protective order cases:** The issue of including findings in all protective orders is one of substantial debate among members of the legal community in Texas. Per statutory reference noted above, at the conclusion of a hearing on an application for family violence protective order, a judge is mandated to include a finding that family violence has occurred and is likely to occur in the future, and if such a finding is made, the judge must issue the protective order.<sup>80</sup> Similarly, if a court finds that a sexual assault protective order applicant is a victim of said crime, the court "shall issue a protective order that includes a statement of the required findings."<sup>81</sup> Thus, some prosecutors – joined by some judges – believe that an order lacking such a finding is not a valid protective order. This determination, if deemed correct, would have implications for enforcement on both state and federal levels. In order for federal law to apply for jurisdictional purposes of interstate protective order violations, as well as that for firearms prohibitions, a state must issue a qualified protective order.<sup>82</sup> A "qualified protective order" requires that the person subject to the order must have "notice and an opportunity to be heard; *and* the order must restrain the person from harassing, stalking, or threatening an intimate partner of the person or a child of the person or the intimate partner; *or* engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child. The order must also include *either* a finding that the person subject to the order represents a credible threat to the physical safety of a intimate partner or child *or* a prohibition against the use, attempted use or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury."<sup>83</sup> If a

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<sup>76</sup> Browne, A. "Responding to the Needs of Low Income and Homeless Women Who are Survivors of Family Violence." *Journal of American Medical Women's Association*. 53(2): 57-64 (1998).

<sup>77</sup> *Housing Assistance Under-Funded, But Critical to Survivors of Domestic Violence*, USA Institute for Children, Poverty and Homelessness (October 2011).

<sup>78</sup> Farmer, Amy and Jill Tiefenthaler, "Explaining the Recent Decline in Domestic Violence," 21 *Contemporary Economic Policy* 158, 169 (2003).

<sup>79</sup> Tex. Family Code Ann. Section 85.021 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>80</sup> Tex. Family Code Ann. Section 85.001 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>81</sup> Texas Code of Crim. Proced. Ann. Article 7A.03 (O'Connor's Texas Criminal Codes Plus (2011-12)).

<sup>82</sup> 18 U.S.C.922(g)(8).

<sup>83</sup> *Id.*

qualified order is violated, federal law prohibits a respondent (excluding law enforcement officers) from possessing firearms or ammunition during the course of the protective order.<sup>84</sup> Thus, a finding is not actually required under federal law if the other aforementioned requirements are met.

However, confusion around this issue abounds, leading to a refusal to enforce among some law enforcement agencies. Therefore, for this purpose, a finding of family violence can be advantageous and lead to immediate arrest upon violation. Contrarily, some prosecutors do not seek a family violence finding, for a number of reasons. Some prosecutors note that in their court, unless the finding is excluded, the petitioner may not be granted a protective order. A number of judges do not issue protective orders with a finding of family violence, some citing a need to allow the respondent to maintain the right to possess firearms, though under federal law cited above a finding is not necessary.

Further, Texas law requires that a person (other than a peace officer) who is subject to a family violence, sexual assault or stalking protective order may not possess firearms while that order is in place,<sup>85</sup> though this again raises the question of validity of a Texas protective order lacking a finding. Some prosecutors also note that an agreed protective order is commonly only settled with the respondent if a finding is excluded. The prohibitions remain, thus allowing the same protections as one with findings, and the respondent has agreed in open court and in writing to abide by the terms of the order. Thus, even if a protective order violation presents questions of criminal enforcement by peace officers on the scene, the respondent is still subject to civil and criminal sanctions of contempt for violation of a court order.<sup>86</sup> An agreed order does not require the victim to take the stand, which avoids the need for her to confront the abuser in open court, which opens her up to potentially vigorous cross-examination including character attacks. Such circumstances also give the defense an opportunity to essentially perform additional discovery on a pending criminal case and could provide them statements against interest or even perjury on the part of an intimidated victim. Prosecutors cite the remedies of an agreed order as offering the same protection as does an order containing a finding. However, the lack of a finding in a protective order has implications beyond that case. Victims cannot obtain crime victims compensation without a finding and findings can support an immigrant victim's needs for protection under federal law. Thus, dispute continues on this issue, though prosecutors on both sides should balance the benefits of a finding of family violence in all protective orders.

**Whether your office requires recent violence, and how that is defined:** Family violence exists on a continuum, and even the definition of “violence” has different meanings and complications for every victim. Violence in the form of psychological, emotional, economic or spiritual abuse, while not included in the legal definition of family violence in Texas, can pose a threat to the victim resulting in real fear that the violence will escalate. An isolated crime of physical or sexual violence can be severe enough that the abuser need not perpetrate that type of violence again to instill in the victim the threat that it could happen again at any time. Thus, severe past violence which could establish the need for a protective order may not fit into the limited time frame some prosecutors require. One option in determining whether the victim is in

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<sup>84</sup> *Id.*

<sup>85</sup> Tex. Penal Code Ann. Section 46.04 (O'Connor's Texas Criminal Codes Plus (2011-12)).

<sup>86</sup> Tex. Family Code Ann. Section 85.005 (O'Connor's Texas Family Code Plus (2011-12)).

need of a protective order includes more detailed questioning to determine whether past abuse impacts the allegations of the victim applying for the current protective order. The application can then be drafted in such a way as to explain the significance of the facts before the court. A real and relatable fear of future violence can exist based on events that occurred further in the past than some prosecutors' policies currently allow.

**Whether your office obtains extensions if the batterer has been incarcerated:** In some cases in which physical or sexual abuse occurred, the applicant may have been arrested and incarcerated. This is sometimes against the wishes of the victim, often based on fear that once the respondent is released, the abuse will be significant or even lethal. A respondent's behavior in jail is not always reflective of how he will act upon release. Just because no violation occurred while the respondent was incarcerated does not mean he will not contact and/or abuse the victim once released. For this reason, Texas law provides for automatic extension of a protective order for one year after the offender is released.<sup>87</sup> Such an order puts law enforcement on notice of the extension for the purposes of enforcement. Although law enforcement has authority to arrest without a warrant if they have reason to believe that a valid protective order exists and has been violated (not in their presence), such an arrest is discretionary.<sup>88</sup> If the officer refuses to arrest on a protective order violation regardless of victim's request, the victim's alternative is to have: a copy of the protective order which expired while the offender was incarcerated, proof that he was indeed incarcerated at that time, and perhaps even a copy of statutory authority for the officer to arrest. Even then, the arrest is still discretionary without an actual copy of an order or its entrance into the state database. Since this burden is not only unrealistic but also unknown to most victims, prosecutors obtaining an extension order can improve chances of enforcement.

**Whether your office files protective orders for teens:** Teen victims of dating violence face additional barriers to safety. They face social misconceptions which minimize dating abuse as less than criminal behavior involving young partners who are inexperienced at handling dating situations appropriately. This can make it more difficult for teen victims to recognize abusive relationships. Further, students often must have contact with one another due to course schedules and class assignments. Many prosecutors responding to this survey noted that they would only file a protective order for a minor if their parent was involved in some way. The law now allows for teens to file their own,<sup>89</sup> and they have the same rights to assistance from a prosecutor than do adult victims. Teens may fear telling a school counselor or teacher, because they are required to report abuse of minors and may notify the teen's parents. Teens may be afraid of telling their parents about the abuse, because the violence may have occurred while they were doing something they are not allowed to do.<sup>90</sup> Only 33% of teens who were in a violent relationship ever told anyone about the abuse.<sup>91</sup> In fact, less than 25% of teens say they have even discussed dating violence with their parents.<sup>92</sup> This all leads to teens seeking protective orders on their own in the most severe cases of abuse, most in need of protective orders.

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<sup>87</sup> Tex. Family Code Ann. Section 85.025 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>88</sup> Tex. Code Crim. Proc. Ann. Article 14.03 (O'Connor's Texas Criminal Codes Plus (2011-12)).

<sup>89</sup> Tex. Family Code Ann. Section 82.002 (O'Connor's Texas Family Code Plus (2011-12)).

<sup>90</sup> [www.MissouriFamilies.org](http://www.MissouriFamilies.org).

<sup>91</sup> [www.LoveIsRespect.org](http://www.LoveIsRespect.org).

<sup>92</sup> Liz Claiborne Inc. study of teens 13-17 conducted by Applied Research and Consulting LLC (Spring 2000).

**Whether your office provides language access:** As noted above, several federal provisions require that the courts offer interpretation services for victims seeking protective orders, some prosecutors' offices do not provide them. Unfortunately, prosecutors often do not request that the court do so, either, and not all judges provide language interpretation as a matter of course. Victims rarely have the knowledge of laws surrounding language assistance and should not be required to request it for themselves. Attorneys are bound by ethical duty as officers of the court to provide zealous representation for their clients and seek all available forms of relief. "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applies."<sup>93</sup> Specifically relating to the representation of family violence and sexual assault victims, attorneys should strive to provide culturally competent services, one fundamental American Bar Association best practice recommendation being "developing methods for using interpreters effectively."<sup>94</sup> The fundamental foundation of the United States court system demands that language interpretation services be granted.

## Conclusion

In conclusion, inconsistent practices among prosecutors in Texas in filing or refusing to file protective orders on behalf of family violence and sexual assault victims results in a lack of access to one type of legal protection which can be crucial to victim safety. This lost opportunity is based to a large extent on the unilateral policies and practices of prosecutors highlighted in this report. Victim safety cannot be assured without apposite, comprehensive legal access to the courts. Discourse on a state-wide level must be undertaken to develop a cohesive, uniform response to family violence and sexual assault protective orders.

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<sup>93</sup> *How Far a Lawyer May Go in Supporting a Client's Cause*, American Bar Association's Canons of Professional Ethics, Canon 15 (first adopted August 27, 1908).

<sup>94</sup> *Standards of Practice for Lawyers Representation Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases*, American Bar Association's Commission on Domestic Violence (2007).



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