

Orders of Protection: What they are and how to get them

COPE staff are available to assist victims of domestic violence, sexual assault, stalking or harassment through the process of obtaining an Order of Protection. Victim advocates can provide immediate assistance, help review immediate safety concerns, and provide support to the victim throughout the process. COPE may also provide an attorney to represent the victim in these proceedings.

An Order of Protection is a court order from the District Court which forbids the respondent, the alleged perpetrator, from committing further acts of violence, harassment and stalking against the named protected party or parties. Usually the order forbids any direct or indirect contact by the offender towards his or her victim. The purpose of the Order of Protection is to provide a measure of safety to those who have experienced domestic abuse as well the children who might or may not have been directly affected.

New Mexico statute defines “domestic abuse” as the act of “stalking or sexual assault whether committed by a household member or not, physical harm, severe emotional distress, bodily injury or assault, a threat causing imminent fear of bodily injury by any household member, criminal trespass, criminal damage to property, repeatedly driving by a resident or work place, telephone harassment, harassment, or harm threatened to children under the same circumstances. A “household” member means a spouse, former spouse, parent, present or former stepparent, present or former parent-in-law, grandparent, grandparent-in-law, child, stepchild, grandchild, co-parent of a child or a person with whom the petitioner has had a continuing personal relationship. Cohabitation currently or previously is not a factor. It is important to note that that the parties must fall under the definition of a household member in order for the court to issue the Order of Protection unless there has been stalking or sexual assault §40-13-2 NMSA 1978.

Stalking in New Mexico occurs when an individual purposely commits two or more acts on separate occasions through any action indirectly or through a third party, including following, threatening, monitoring, surveillance, or communication with the intent of causing the targeted person to be in reasonable fear “of death, bodily harm, sexual assault, confinement or restraint” of themselves or another person. § 30-3A-3 NMSA 1978.

Harassment consists of knowingly pursuing a pattern of conduct (two or more acts) that is intended to annoy, seriously alarm or terrorize another person and that serves no lawful purpose. The conduct must be such that it would cause a reasonable person to suffer substantial emotional distress. §30-3A-2 NMSA 1978.

New Mexico has three forms of orders of protection: the ex-parte emergency order, the temporary order, and the long term standard order of protection. The emergency order of protection is filed by law enforcement by telephone or by fax with the district court or the on-call judge if after business hours. The purpose of the emergency order is to provide immediate protection to those in danger until the customary petition for order of protection can be filed. The emergency order expires within seventy-two hours or the end of the court’s next business day whichever is sooner §40-13-3.2 NMSA 1978.

Following or independent of the emergency order of protection, a person falling under the definition of domestic abuse may file a petition for an order of protection which is usually accompanied by a petition for a temporary order. Unlike the emergency order, these two petitions are not filed by law enforcement nor is law enforcement involvement required. The abused party may complete the petition and file it at the court house. COPE staff are available to assist domestic violence victims as they complete their petitions.

The district judge, upon review of the petition, may grant an ex parte temporary order of protection. The temporary order, much like the emergency order, may provide for short term custody and visitation of minor children, possession of home and vehicles, and prohibits contact by the restrained party upon the petitioner and household members. While the emergency order is in force for no more than the seventy-two hours, the temporary order may remain in effect up to ten days where upon the court is required to hold a hearing on whether to extend the matter into a long-term order or not.

Once the respondent is served and a hearing is set, the parties generally appear before a Domestic Violence Hearing Commissioner. The Commissioner hears evidence presented by both sides. If the respondent fails to come to court, the petitioner is allowed to give a brief statement outlining the events leading up to the petition. In most such instances a default order of protection will result. If the respondent is present then he or she may agree to a stipulated order of protection which means there is no finding of abuse but the respondent has agreed to the order of protection and its provisions. Lastly the respondent may ask the court to move forward with a trial on the allegations.

When a trial takes place the victim proceeds first, detailing to the court the events that are alleged in the petition. Witnesses may be called particularly law enforcement as well as others present during the events described. Following the petitioner's testimony the abuser or their attorney has the right to cross examine the witness, just like any other trial. After the victim has presented his or her case the respondent may do the same or they may decide not to present evidence. Beyond the issue of abuse the commissioner will be looking for testimony related to the parties' relationships with any minor children, current living arrangements including mortgages and rents, the vehicle situation and the need of the victim for spousal support §40-13-5 NMSA 1978.

Once the commissioner hears all the testimony he will make a recommendation as to whether an order of protection will be issued against the respondent, the restrained party, and for what length of time. In the Twelfth Judicial District the majority of orders are for a year with a few extending two to four years in length. If applicable the commissioner will make a recommendation as to who will retain the family residence, if the abuser is required to pay any of the household expenses or financial support to the victim, and if any property needs to be exchanged between the two. If, when and how any contact may be permitted between the petitioner and respondent is reviewed during the hearing. Further, while only ordered for six months, the physical custody of dependents, visitation, and child support are taken into consideration. *Id.*

The commissioner's recommendation is not the final order. The proposal is forwarded to the assigned judge where the petition, file and recommendation are reviewed. The judge may or may not make changes to the proposal whereupon the actual order is signed and becomes official. If the victim feels the commissioner has made an error in his recommendation, a motion for review may be filed with the clerk at which point the judge will set another date to hear argument directly from the parties §40-13-10 NMSA 1978.

The signing of the actual order is not the end for the victim. It is imperative that copies of the order are provided to the work place, children's schools, day care facilities, landlords and anyone else that may come into contact with the protected and restrained parties on a regular basis. The local sheriff's department will also receive a copy of the order and upon receipt is required to enter the information into the National Crime Information Center's data base. If the abuser does violate the order of protection, New Mexico law states that "a Peace officer *shall*

(means must) arrest without warrant and take into custody a restrained party whom the police officers has probable cause to believe has violated and order of protection” §40-13-6 NMSA 1978 (emphasis added). If no arrest occurs, this does not mean the victim is without recourse as they may also file a motion to violate the order civilly. In fact the statute allows *both* civil and criminal prosecution of the violation. A violation of an order of protection could send the restrained party to jail on the first offense and on the second offense there is a mandatory seventy-two hours of imprisonment. *Id.*, § 40-13-3(F) NMSA 1978.

Orders of protections are effective. An eighteen month study was conducted between January 2001 and June 2002 in Houston, Texas of women who had obtained orders of protection both temporary and permanent. Even for the women who were not granted the order, the majority reported that just applying for the order reduced the level of violence they suffered. The largest number of violations related more to the nonadherence to the “stay 200 ft. from the woman’s home or workplace” verses actual physical violence. The study surmised that the actual contact with the justice system and the placing the abuse in the public eye prevented recurrence of violence¹

The Order of Protection is a tool, just like batterers’ treatment programs, the criminal justice system, shelters and other resources made available to the victim of domestic violence. It takes and will continue to take the application of a number of these tools in conjunction with one another to provide the safety to which all people are entitled in their relationships and lives.

1

¹ McFarlane, DrPH et al. (2004) *Protection Orders and Intimate Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*. Vol 94, No. 4. American Journal of Public Health.