

Domestic Violence Orders of Protection: A Judge's perspective

Honorable David G. Guyton, Judge, Family Court, 16th Judicial Circuit

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Disclaimer: My comments represent only my thoughts and ideas, and should not be attributable to the SC Bar, my fellow Family Court Judges, or any public agency, private entity, or non-profit organization. This purpose of this paper is provide my perspective on Order of Protection (OOP) hearings to victims, Victim Advocates, law enforcement, and to provide guidance and training on ways to prepare a victim which will increase the likelihood of obtaining a restraining order.

Role of the Judge in Family Court OOP hearings: While presiding over the hearing on a petition for an Order of Protection under the Protection From Domestic Abuse Act (the Act), a Family Court Judge must be fair, impartial, and act without prejudice. There is no jury in Family Court. The Judge is the trier of fact, and has a lot of discretion in determining the facts, deciding what evidence to consider, and assessing the credibility of witness testimony. The Judge then applies the facts to the law to decide whether or not the Petitioner is entitled to a restraining order, called an Order of Protection (OOP) under the Act.

Most OOP hearings are conducted without attorneys. A purpose of the Act was to provide a process for a victim of Domestic Abuse to get into court quickly and without incurring the expense of retaining counsel, which would in many cases be cost prohibitive. The Judge cannot be an advocate for either the Petitioner or the Respondent, nor provide advice to either Party. However, most Judges will attempt to guide the Parties through the proceeding as efficiently and fairly as possible. I have found a short explanation of the proceeding or of my evidentiary decisions to the Parties is helpful, but the hearings are placed on the docket on an emergency basis and allotted only 15 minutes. Judges have to monitor the docket to avoid getting way behind early in the day. Being fair, adhering to the law, following the rules of evidence and procedure, and being efficient with use of court time can be a hard balance to maintain.

I believe a good Victim's Advocate (VA) who prepares a victim/Petitioner for the OOP hearing, can make all the difference as to whether the restraining order is issued or not. The VA can sit with the Petitioner at the counsel table where an attorney would normally sit with a client, but cannot provide advice or act as their attorney during the proceeding.

An OOP hearing is a civil hearing to determine whether or not the Respondent is prevented from contacting the Petitioner, and if so, under what conditions. It is not a criminal trial where incarceration or a fine may result. The burden of proof at an OOP hearing is a preponderance of the evidence, which is a much lower burden of proof than the beyond a reasonable doubt burden of proof required for criminal trials. I believe the goal of the Respondent and their VA is to show the Judge that the Respondent has been physically hurt by the Respondent, has been threatened by the Respondent, or that the Petitioner has a reasonable fear of being harmed by the Respondent, and that the OOP is needed to prevent injury or further harm.

If the Respondent has been charged with a criminal offense related to the incident giving rise to the need for the OOP, he may also have a restraining order already in place as a condition of his bond which allowed him to remain out of jail while the criminal charge is pending trial. The OOP is a separate order such that even if his restraining order on his bond was lifted, the OOP would remain in place until it expires. The OOP is generally for a period of 6 months or one year and it can be extended by a Judge at another hearing requested by the Petitioner. The Petitioner has a big advantage at an OOP hearing if the Respondent has a pending criminal charge based on the same incident because any sworn testimony he gives at an OOP hearing can be used against him in the criminal trial. The Family Court Judge will warn him about testifying, and tell him that he does not have to testify, and cannot be made to testify because of his 5th Amendment right under the U.S. Constitution against self-incrimination. If the Respondent has any sense at all, he will invoke this right and remain silent, thus being unable to dispute the Petitioner's allegations, increasing the likelihood that the OOP will be granted.

Witness preparation is essential to obtaining an OOP. Many victims have never been in a courtroom before. They are very nervous about being in front of a Judge and knowing what to say, and are under even more stress because they will probably face their abuser in the courtroom, possibly for the first time since the incident took place. For some, it is the same or feels the same as a panic attack. They are nervous, scared, shaking, and can't get words out of their mouth when trying to speak. I strongly recommend practicing the testimony in advance of the hearing, the more times the better. Like most things we fear in life, the hardest time is the first time we try it, and it gets easier from that point forward. My materials include a sample script for a victim to use as a guide for her testimony. A Victim's Advocate can go through the script with the Respondent, fill in the information as appropriate, and then have the victim practice the testimony. The victim can read from the script if needed, but the best case scenario is when the victim just has to refer to it as her notes if she forgets something. Just going through it a couple of times in advance gives the victim an idea of what to expect in the courtroom. I recommend actually setting up some chairs like a mock courtroom, and go through the motion of calling the Respondent to the witness stand, swearing her in, and having her give her testimony. If there is enough time, ask for permission to go into a courtroom and practice the testimony. I would certainly be glad to allow the use of the courtroom for that purpose. I just need to let bailiffs and deputies know in advance so they can make it available and secure.

The demeanor of the victim as a witness certainly impacts the Judge's decision. If it appears the victim is scared and fearful because she is nervous, crying, talking softly, or has trouble breathing, that tells me she is sincere. Judges are listening to the tone of voice and watching body language in addition to the actual testimony.

Please advise the victim that the courtroom is not a stage set for the Jerry Springer, People's Court, Judge Judy, or Dr. Phil show. Raising your voice, talking out of turn, cursing, and sudden movements usually do not end well in court, and obviously such conduct does not reflect well on credibility or an actual fear of the Respondent.

A Victim Advocate can prepare a witness without "coaching" the witness. You cannot tell them what to say, but you can help them practice telling their story in a clear and sincere way. Have them describe what happened as if they were telling the story to someone new (which they are doing) so

that it is easy to understand and visualize. Judges like brief, relevant, and to the point testimony. We do not need to hear the entire history of the relationship, only the points necessary to justify the Order of Protection. I hope that reviewing the attached script will assist in doing so, and it is probably more detailed than will be needed in most cases.

Prepare the Victim for the possibility that the Respondent might "lawyer up" and appear with an attorney. If that happens, they need to be prepared for cross examination. Knowing in advance that they may get asked a lot of questions by an attorney may prevent the sense of panic that is completely normal under those circumstances. You should tell a Victim to always tell the truth, do not make anything up, respond "I don't know" if she doesn't know, and respond "I can't remember" if she cannot remember. She should also answer only the question asked, and then stop. Attorneys are often "on a fishing expedition" to get additional information which could be used against the Petitioner or damage her case somehow. Tell the Victim that if they did not understand a question, she should say "can you repeat the question" or "I don't understand the question". Tell the Victim that the Judge is expecting the truth, but the Judge will not allow the attorney to berate or demean the Victim on the stand. You may also tell the Victim that answering a question in a way that is self-serving is okay as long as it is the truth.

If the Victim has visible injuries from a recent DV incident, prepare the Victim to testify on how to show the Judge those injuries and describe them for the Court record. For example, "My right eye is swollen and black from when he hit me with his fist Saturday night", or "I have 10 stitches on my left forearm where he cut me with his knife". The Victim may ask the Judge "do you want me to show you the bruises on my arms and legs where he hit me with the broom stick?" I have sometimes allowed, or even asked, a Victim to move or remove (if appropriate) an article of clothing in order to see an injury the Victim is referring to in her testimony. Fresh cigarette burns to any part of the body speak volumes when the Victim attributes them to the Respondent. I have also described the injury on the record to preserve the testimony or observation for possible use at a subsequent hearing.

If the victim has pictures of her injuries, prepare her for how to get those into evidence and made a part of the record at the OOP hearing. It will help immensely if someone can assist a Victim in printing cell phone pictures and making sure the victim brings them into court. The bailiffs will not normally allow cell phones to come in to the courthouse at all, so the Victim will be very frustrated if she has good pictures on her phone but cannot get them into court and on the record. The next step is to practice getting the pictures in the record. (Please refer to my sample script) The main points to make to the Judge are describing what is in each picture, stating when they were taken, who took them, that they haven't been altered, and that they accurately reflect the injuries on the date and time they were taken.

If there was a witness to the incident giving rise to the need for an OOP, please encourage or assist the Victim in getting the witness to the hearing. A witness to corroborate what the Victim testifies about makes the decision to grant the restraining order a lot easier for the Judge. If the Petitioner is pro se, she needs to know the basic questions to ask her own witness when she calls the witness to the stand. I recommend that she have a short list of questions listed on a piece of paper that she can read from, or she will likely forget something important, or even be too nervous to speak. The following is a list of basic questions the Petitioner can use to ask a supporting witness:

What is your name?

Where do you live?

How do you know me?

Where were you on (date) at approximately (time)?

What did you see happen? (simply guide the witness into telling the story of what happened as briefly as possible, but emphasizing the assault and injury, or threat of harm, from the Respondent to the Petitioner. Often the question will be "What happened next?"

The Judge cannot accept opinions or speculation. The Judge will allow descriptions such as "Mr. Smith was yelling at Mrs. Smith loudly, threatening to kill her, and walking toward her with a knife in his hand".

The Judge also cannot accept what someone else said (the often cited hearsay objection) unless it was the Petitioner or Respondent speaking. Focus on what was seen and heard at the incident, not what someone said at a later time. Again, Judges appreciate getting to the point and brevity.

A sworn affidavit by a witness who is not present and therefore can't be cross examined is not allowed.

If law enforcement was called to the scene there will be an incident report, which often gets attached to the Petition. It is not evidence simply because it is attached, but frankly most Judges will review it as part of their decision whether to grant an emergency hearing. At the hearing, it will probably be read by the Judge during the proceeding while listening to the witness unless objected to by the Respondent.

A tip for Victim Advocates or attorneys is to try to find out who the Judge is in advance of the hearing. If you have been in front of the Judge before, you may remember what the Judge likes, or more importantly, what he or she does not like, during the hearing. If you have not been in front of that Judge before, call around to those who have appeared in front of the Judge and listen to what they have learned. Also consider asking the bailiffs or deputies, especially if you have a specific question. Judges can be very different in the ways we handle proceedings.

Don't hesitate to let the courtroom deputies know if you believe there are specific safety risks or if there have already been issues in the parking lot or waiting area. Extended family members of the Petitioner and the Respondent can sometimes turn a bad situation into a Hatfield v. McCoy turf war. I have found our York County Sheriff's Deputies to be especially vigilant when it comes to domestic abuse cases. I try to remind them to keep as much space between the Petitioner and the Respondent in the courtroom as possible. Obviously having the VA or attorney sit beside the Petitioner, but between the Petitioner and Respondent can provide a degree of comfort for the Victim.

Judges are not receptive to Petitioners who are using a Petition for Protection From Domestic Abuse as a substitute for a private divorce, separation, child custody, or child support action in Family Court. The primary purpose of the statutory scheme is to provide a method for a DV Victim to obtain a restraining order without the usual 4 to 6 weeks delay to get in to court. Petitioners should ask for child support, or the payment of rent, utilities, or alimony if the financial fact situation is properly presented. It usually becomes apparent through the Petitioner's testimony if there is not a sincere threat of harm or fear, and she is simply trying to get an advantage on child custody and support, or

getting the Respondent kicked out of the home. I often encourage the Parties to file private actions for other issues and remind them that the OOP is only temporary. I did include a section in my sample script to show how to ask for financial relief.

It is very frustrating for a DV Victim to fail to appear for their hearing. Most Judges will continue, instead of dismiss, the OOP hearing, because of the possibility the Respondent has threatened the Petitioner. I may place language in the continuance order to the effect of "the Petitioner has 30 days to request another hearing. If another hearing is not requested within 30 days of today's date, the Clerk of Court shall dismiss this matter without prejudice". If the Petitioner appears and asks the court to dismiss the case, I will usually place her under oath and ask questions about whether this is voluntary, has she been threatened, does she understand she will not have any legal protection if she drops her case. If a Petitioner signs a statement that she desires to dismiss the case and gives it to the Clerk of Court's office, I will usually request the scheduling clerk to set a hearing on the dismissal and require the Respondent to come to court, especially if I am aware of a particularly bad fact situation. The worst thing a Family Court Judge wants to discover is that he or she dismissed a case and then the Victim is hurt again or killed.

I hope some of this information will be helpful to everyone who assists victims of domestic violence, especially in preparation for the OOP hearing and understanding the Judge's perspective when presiding over the OOP hearing in Family Court. Please feel free to share this information without need for permission, and to use the sample script as a guide, modifying it any way you need to help Victims present their case in court.