

DOMESTIC VIOLENCE DEFENSE

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New Jersey domestic violence laws are very strict. A spouse or girlfriend could call the police and if there are any signs of physical injuries the police must arrest the man. Even without independent witnesses and no physical injuries, police may arrest the man. The police are required to give the victim information about their rights and to help them. Among other things, police must write up a report. For example, O.J. Simpson would not have gotten away with abuse in New Jersey. Police are automatically required to arrest an abuser if they see any evidence of abuse or assault.

Even during the evening, your town Municipal Court or Superior Court can issue a Restraining Order which is a legally enforceable document. The Temporary Restraining Order (TRO) will prohibit the defendant/abuser from any contact with the victim or entering the residence.

Unlike a criminal case where a person is provided with lengthy due process rights, and if guilty receives probation and a monetary fine, a domestic violence hearing allows judges to issue far reaching orders. A domestic violence hearing is usually held within only ten (10) days after the filing of an ex parte complaint and temporary

restraining order. After a hearing, NJSA 2C:25-29 (b) allows the Chancery Division, Family Part Judge to grant substantial relief to the complainant.

Our Supreme Court has already found that the ten-day provision comports with the requirements of due process, but can be delayed.

In *H.E.S. v. J.C.S.*, [175 N.J. 309](#), 323 (2003), the Court held:

“the ten-day provision does not preclude a continuance where fundamental fairness dictates allowing a defendant additional time. Indeed, to the extent that compliance with the ten-day provision precludes meaningful notice and an opportunity to defend, the provision must yield to due process requirements.” [Internal quotations and citations omitted.]

Discovery not mandatory in Domestic Violence family cases

Domestic violence actions are "summary actions," a fact that inherently precludes the right to discovery. See, e.g., *H.E.S.*, supra, 175 N.J. at 323. However, the Appellate Division in *Crespo v Crespo* 408 NJ Super. 25 (App. Div. 2009) noted that one trial court has determined that, in accordance with Rule 5:5-1(d), a defendant may seek leave to obtain discovery in such a matter upon a showing of good cause. *Depos v. Depos*, [307 N.J. Super. 396](#), 400 (Ch. Div. 1997). The Appellate Court agreed with the opinion of Judge Dilts in *Depos* that in compelling circumstances, where a party's ability to adequately present evidence during a domestic violence action may be significantly impaired, a trial judge may, in the exercise of sound discretion, permit limited discovery in order to prevent an injustice. Judges are not required to be oblivious to a party's claim for discovery in compelling circumstances even though the court rules do not expressly authorize relief. See, e.g., *Kellam v. Feliciano*, [376 N.J. Super. 580](#), 587 (App. Div. 2005).

The Crespo court held “Here, the record reveals that at no time did defendant seek leave to conduct any discovery proceedings.” Therefore, it is important for defense counsel to demand discovery.

In *Pepe v Pepe*, 258 N.J. Super. 157 (Chan. Div. 1992) held that the confidentiality provision of record keeping under the Domestic Violence act applies to the records kept on file with the Clerk of the Superior Court.

The Family Judge Powers:

At the hearing the judge of the Family Part of the Chancery Division of the Superior Court may issue an order granting any or all of the following relief:

(1) An order restraining the defendant from subjecting the victim to domestic violence, as defined in this act.

(2) An order granting exclusive possession to the plaintiff of the residence or household regardless of whether the residence or household is jointly or solely owned by the parties or jointly or solely leased by the parties. This order shall not in any manner affect title or interest to any real property held by either party or both jointly. If it is not possible for the victim to remain in the residence, the court may order the defendant to pay the victims rent at a residence other than the one previously shared by the parties if the defendant is found to have a duty to support the victim and the victim requires alternative housing.

(3) An order providing for parenting time.....

(4) An order requiring the defendant to pay to the victim monetary compensation for losses suffered as a direct result of the act of domestic violence. The order may require the defendant to pay the victim directly, to reimburse the Victims of Crime Compensation

Board for any and all compensation paid by the Victims of Crime Compensation Board directly to or on behalf of the victim, and may require that the defendant reimburse any parties that may have compensated the victim, as the court may determine.

Compensatory losses shall include, but not be limited to, loss of earnings or other support, including child or spousal support, out-of-pocket losses for injuries sustained, cost of repair or replacement of real or personal property damaged or destroyed or taken by the defendant, cost of counseling for the victim, moving or other travel expenses, reasonable attorneys fees, court costs, and compensation for pain and suffering. Where appropriate, punitive damages may be awarded in addition to compensatory damages.

(5) An order requiring the defendant to receive professional domestic violence counseling from either a private source or a source appointed by the court and, in that event, requiring the defendant to provide the court at specified intervals with documentation of attendance at the professional counseling. The court may order the defendant to pay for the professional counseling.

(6) An order restraining the defendant from entering the residence, property, school, or place of employment of the victim or of other family or household members of the victim and requiring the defendant to stay away from any specified place that is named in the order and is frequented regularly by the victim or other family or household members.

(7) An order restraining the defendant from making contact with the plaintiff or others, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm including, but not limited to, personal, written, or telephone contact with the victim or other family members, or their employers, employees, or fellow workers, or

others with whom communication would be likely to cause annoyance or alarm to the victim.

(8) An order requiring that the defendant make or continue to make rent or mortgage payments on the residence occupied by the victim if the defendant is found to have a duty to support the victim or other dependent household members; provided that this issue has not been resolved or is not being litigated between the parties in another action.

(9) An order granting either party temporary possession of specified personal property, such as an automobile, checkbook, documentation of health insurance, an identification document, a key, and other personal effects.

(10) An order awarding emergency monetary relief, including emergency support for minor children, to the victim and other dependents, if any. An ongoing obligation of support shall be determined at a later date pursuant to applicable law.

(11) An order awarding temporary custody of a minor child....

(12) An order requiring that a law enforcement officer accompany either party to the residence or any shared business premises to supervise the removal of personal belongings in order to ensure the personal safety of the plaintiff when a restraining order has been issued. This order shall be restricted in duration..

(13) An order granting any other appropriate relief for the plaintiff and dependent children, provided that the plaintiff consents to such relief, including relief requested by the plaintiff at the final hearing, whether or not the plaintiff requested such relief at the time of the granting of the initial emergency order.

(14) An order that requires that the defendant report to the intake

unit of the Family Part of the Chancery Division of the Superior Court for monitoring of any other provision of the order.

(15) In addition to the order required by this subsection prohibiting the defendant from possessing any firearm, the court may also issue an order prohibiting the defendant from possessing any other weapon enumerated in subsection r. of N.J.S.2C:39-1 and ordering the search for and seizure of any firearm or other weapon at any location where the judge has reasonable cause to believe the weapon is located. The judge shall state with specificity the reasons for and scope of the search and seizure authorized by the order.

(16) An order prohibiting the defendant from stalking or following, or threatening to harm, to stalk or to follow, the complainant or any other person named in the order in a manner that, taken in the context of past actions of the defendant, would put the complainant in reasonable fear that the defendant would cause the death or injury of the complainant or any other person.

(17) An order requiring the defendant to undergo a psychiatric evaluation.

Despite the substantial financial burden and life restrictions (often referred to as penalties), the burden of proof in a DOMESTIC VIOLENCE hearing is only “by a preponderance of evidence” and not “beyond a reasonable doubt.”

Too often lawyers throw up their hands when a client presents a complaint involving domestic violence and related criminal charges. While defense of the complaint may become an involved process requiring commitment and persistence, there are a number of viable defenses and arguments that can achieve a successful result. Rather than simply suggest that a client plead guilty and avoid trial, an attorney should accept the challenge and apply his best legal talents to protect the client’s rights.

We require a great deal of cooperation from our clients in an effort to help keep their costs reasonable. We require our clients to prepare diagrams and provide us with the names, addresses, and telephone numbers of witnesses.

Sometimes a family friend can act as a go between for the parties and convince the complainant to dismiss the charges. A DOMESTIC VIOLENCE complainant can be withdrawn. However, if a criminal complaint is signed by the police, only the prosecutor can make a motion to dismiss.

1. The In-Office Interview at the Law Office

We advise potential clients to bring in a copy of the complaint, all their papers in connection with their case, and any documents they received from the Police or a court. Often we will instruct them to write a confidential narrative for themselves if it is a case that is fact-specific or involves a great deal of detail, to help them remember the facts.

Prior to the client coming into the office we e-mail them the Confidential New Client Interview Sheet. We obtain background information such as their name, address, the offenses charged, date of the person's arrest, other witnesses, what they told the police, their occupation and information regarding prior criminal arrests and immigration status. Our interview sheet also asks if there is anything else important, such as a medical condition that affects their case. This form will also let us know whether or not the client will follow instructions and cooperate with us. If they refuse to provide information we may have a problem client.

After reviewing the complaint and the interview sheet at the in-office consultation I ask a series of questions of the client. We request the client wait until the end of the interview before explaining their side of the story. We also ask them if there is

anything else of importance in connection with the case that we should know. The client may have pending serious criminal charges in another state or county. I often open up our statute book and show the clients the specific language of the offense they are charged with and explain to them the maximum penalties that could be imposed. By understanding the charges they are facing, my clients are more likely to realize the seriousness of the offense and pay our retainer.

2. Retaining the Attorney

Rule 1:11-2 of the Rules of Professional Conduct indicates that a retainer letter or written statement of fees is required for new clients. I also provide all my clients with written information explaining how to appear in court, our website pages to the offenses charged, and information regarding substance abuse treatment, if applicable.

Once we receive our retainer (are paid), we begin work right away. Usually while the client is still in the office, we prepare a discovery letter on the computer to the prosecutor/district attorney and court and hand a copy to the client. We occasionally call the court to advise them that we will be handling the case and to inquire who handles discovery. We check the State Lawyers Diary to determine who are the judges and prosecutor/district attorneys for the county or town. It is important to know who may be the judge and the prosecutor.

3. Post Interview Work When a Criminal Charge is Filed in Connection with the Family Domestic Violence Complaint.

Motions to Dismiss should be made in writing such as statute of limitations or lack of jurisdiction. In the case involving essential witnesses, we occasionally write to the witnesses and ask them to call us so that we can find out what really happened. If possible I

have our law clerks call the witness after we send the initial letter. The attorney cannot testify if the witness provides an inconsistent statement but our law clerks can testify. I sometimes speak to friendly witnesses myself later to make a decision to determine whether or not the witnesses are credible.

If we discover a favorable reported decision, we make a copy for the judge, prosecutor, and client. Never assume the part time prosecutor or judge is familiar with all the laws. We can prepare a Subpoena ad Testificandum for witnesses to testify and Subpoena Duces Tecum for witnesses to bring documents. It is better to be over-prepared than under-prepared.

4. Discovery In Criminal Charges

Often we do not receive all of the discovery that we request. We send a letter to the prosecutor requesting additional discovery and request that the discovery be provided within 10 days. If we do not receive the discovery within 10 days then we prepare a Motion to Compel Discovery.

Upon receiving discovery, we forward a photocopy of all discovery to our client. We then discuss with the client whether or not they have a reasonable prospect of winning.

I recommend that my clients provide me with a list of between 10 to 15 reasons why they should not go to jail and why court should impose the minimum probation term. This provides us with information for mitigation of penalties and also provides information to be considered by the judge in sentencing.

5. Preparing for Court

When we receive the hearing notice we send a follow up reminder to the client to be on time, bring all papers and call 24 hours ahead to

confirm the case is still on the calendar. The client should be prepared and look neat. The Grateful Dead and Budweiser T-Shirts should be replaced with something that looks presentable. They should have their pregnant wives sitting next to them.

Preparation is the key to winning cases or convincing the prosecutor of exceptional defenses. Upon arrival at court, we will attempt to ascertain if the police officer is available. Sometimes the police officer is on vacation, retired, or suspended. This may assist your ability to work out a satisfactory arrangement.

There is no prohibition against speaking with State's witnesses in a non-threatening way. Outside of the courtroom, I usually call out the name of the non-law enforcement State's witnesses to determine what their version of the facts is. If we have an excellent trial issue but believe the judge is going to rule against us, we bring an appeal notice and file it with the Court on the Record. I keep in my car blank forms for Order to Compel Discovery, Order Mark Try or Dismiss, Order to be Relieved, and an Appeal Notice.

6. Plea to a Lesser Offense in Criminal Charge

If the client is going to enter a guilty plea to an offense, it is important they understand what the offense is and put a factual basis on the record. The Judge will be angry if a person is pleading guilty to a computer theft offense and the judge asked them what they took and the person insists they did not do anything wrong. The judge will send you back to your seat and must refuse to take the guilty plea unless an adequate factual basis is put on the record.

Having previously obtained from my clients their favorable background details in writing, I usually put on the record reasons why the judge should give them the minimum penalties.

Letters of reference and character reference letters are helpful in

cases where the judge has wide discretion in his sentencing. After the client pleads guilty, it is a good idea to also ask the client on the record if he has any questions of myself or of the court.

7. Conclusion

Whether or not we have a trial or there is a plea to reduce the charge, I wish to walk out knowing I did the best I could for the client. Even if I lose, I want to have been such an articulate advocate that the client walks out saying my attorney is great but the judge is wrong. We try to be innovative and prepare new arguments. Additional case law and certain legal defenses are updated on website: www.NJLaws.com.

Kenneth A. Vercammen is an Edison, Middlesex County, NJ trial attorney who has published 125 articles in national and New Jersey publications on business and litigation topics. He often lectures to trial lawyers of the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association.

He is a highly regarded lecturer on litigation issues for the American Bar Association, ICLE, New Jersey State Bar Association and Middlesex County Bar Association. His articles have been published by New Jersey Law Journal, ABA Law Practice Management Magazine, and New Jersey Lawyer. He is the Editor in Chief of the New Jersey Municipal Court Law Review. Mr. Vercammen is a recipient of the NJSBA- YLD Service to the Bar Award.

He has served as a Special Acting Prosecutor in nine different cities and towns in New Jersey and also successfully handled over One-thousand Municipal Court and Superior Court matters in the past 12 years.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters.

He has appeared in Courts throughout New Jersey several times each week on Criminal personal injury matters, Municipal Court trials, and contested Probate hearings. He serves as the Editor of the popular legal website www.njlaws.com