

Magistrate's Orders of Emergency Protection: When It Hurts to Laugh

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Created and presented by:

Hon. Jan Blackstock Matthews,
Ann Landeros,
Kim Piechowiak

REVIEW: MAGISTRATE'S ORDER OF EMERGENCY PROTECTION (*TEX. CODE CRIM. PRO. (CCP) ART. 17.292*)

Protective order available to victims of :

- **Sexual assault/aggravated sexual assault**
(PC 22.011/22.021)
- **Stalking** *(PC § 42.072)*
- **Family violence offense** *(Title 5, Penal Code)*

Granted after arrest and before release on bond

Mandatory if during a family violence assault, the accused

- **used or exhibited a *deadly weapon* OR**
- **inflicted serious bodily injury on victim.**

Learning objectives:

As a result of this training, the participant will be able to:

- **List the**
 - **predicate offenses for a Magistrate's Order**
 - **types of restrictions that can be impose by order**
 - **controlling statutory definitions**
 - **5 lethality factors for family violence offenses**
 - **resources for victims**
- **Assess the seriousness of a predicate offense**

Learning Objectives (cont'd)

- **Cite statistics about Magistrate's Orders**
- **Increase the reporting rate for Magistrate's Orders**
- **State what triggers the federal prohibition on firearms possession**
- **State how bond conditions of safety can enhance victims' safety**
- **Access judicial resources**

WHAT'S YOUR ORDER?: Grading the Assault



WHAT'S YOUR ORDER?: Did Ricky Commit a Predicate Crime?

- **Family Violence Offense**
- **Sexual Assault**
- **Aggravated Sexual Assault**
- **Stalking**



WHAT'S YOUR ORDER:

Did Ricky Assault Lucy?

A. Class C misdemeanor:

- **Offensive contact**
- **Threatening another with imminent bodily injury**

B. Class A misdemeanor:

- **Causing bodily injury to another**
- **Offensive contact with an elderly person**

C. Second degree felony:

- **Impeding breathing of family member or dating partner**
- **Assault that causes serious bodily injury to victim**
- **Using or exhibiting a deadly weapon during assault**

D. First degree felony:

- **Use of deadly weapon to inflict serious bodily injury on a family member**

WHAT'S YOUR ORDER?: Procedures



Must Lucy file a written application?

A written application is not required.

Who else can request the Magistrate's Order on Lucy's behalf?

**Lucy's parent or guardian, a peace officer, the state's attorney, or the court.
(CCP Art. 17.292(a))**

WHAT'S YOUR ORDER?: Procedures

When and how does Ricky get notice that the order is being considered?



Statute is silent.

Must the court hold an adversarial hearing to consider the application?

An adversarial hearing is not required for an emergency order such as a Magistrate's Order .*

***Ex parte Flores, 130 S.W.3d 100 (El Paso 2003, pet ref'd)**

WHAT'S YOUR ORDER?: Procedures



Who may appear before the magistrate when the request is considered?

The statute is silent.

Can Lucy present information or evidence? Is her presence required?

Lucy may appear at Rick's magistration if she chooses because in setting bond, the magistrate must consider:

Lucy's safety. *CCP art. 5.01 and art. 56.02*

Lucy's list of "stay away" locations. *CCP art. 17.49*

Whether Lucy wants to participate in global position monitoring of Ricky. *CCP art. 17.292(c-1) and art. 17.49*

WHAT'S YOUR ORDER?: Contents of the Order



- **Can Ricky be required to stay away from Lucy?**

“Stay away” provisions apply to places, not people.
CCP Art. 17.292 (c)(3)

- **Can Ricky be forbidden from communicating with Lucy?**

Order can limit *how* Ricky communicates, but cannot impose a total ban on communication. (CCP Art. 17.292(c)(2))

WHAT ARE THE CHANCES?:

- **A predicate crime will occur?**
- **Someone will request a Magistrate's Order of Emergency Protection?**
- **A Magistrate's Order will be entered into the statewide criminal database (TCIC)?**

WHAT ARE THE CHANCES: A Predicate Offense Will Occur?

Family Violence Offenses **193,505**

Sexual Assaults **19,007**

Stalking **Unknown**

TOTAL = 212,512+

Almost 20% of all crimes

WHAT ARE THE CHANCES?: A Homicide Will Involve Family Violence

1 in 10

142

Texans killed by intimate partners

10.5% of all Texas homicides in 2010

WHAT ARE THE CHANCES: A Firearm Will Cause a Family Violence Homicide ?

65 %

**92 family violence homicide victims
died from a gunshot wound
in 2010.**

WHAT ARE THE CHANCES?: A Protective Order Will Be Issued

In 2011, which group of judges disposed of the largest number of protective orders?

- A. District Court judges**
- B. County Court at Law judges**
- C. Municipal Court judges**

WHAT ARE THE CHANCE?: Protective Order Statistics

ANSWER: C

Municipal Courts judges issued

10,169

Magistrate's Orders

District Courts

7,829

County Court at Law

787

WHAT ARE THE CHANCES?: Magistrate's Orders as Percentage of All Protective Orders

About 75%

24,558
Issued in 2011

**Most frequently issued type of
protective order in Texas**

REVIEW:

Sending the Order to Law Enforcement

By statute , who is responsible for forwarding the Magistrate's Order to local law enforcement?

- A. The magistrate who issued the order**
- B. The magistrate's clerk**
- C. The court's bailiff**

REVIEW:

Sending the Order to Law Enforcement

ANSWER: **A**

The *magistrate shall* send a copy of the Magistrate's Order to either:

- **Chief of police (if victim resides in municipality)**
- OR
- **Sheriff (if victim resides outside municipality)**

(CCP art. 17.292(h))

WHAT ARE THE CHANCES?: A Magistrate's Order Gets into TCIC

In 2011, how many Magistrate's Orders were entered into the statewide criminal database (TCIC)?

- A. Under 10%**
- B. 10%-49%**
- C. Over 50%**

WHAT ARE THE CHANCES?: A Magistrate's Order Gets into TCIC

ANSWER: A

24,558 Magistrate's Orders issued /
2,019 Magistrate's Orders entered into
TCIC

8.2%

Reporting rate

TIP--IMPROVING THE ODDS That the Order Gets into TCIC

- **Send** the order to local law enforcement agency (police or sheriff)
- **Include** identifiers for restrained person, which are:
 - **Name**
 - **Date of birth**
 - **Race**
 - **Sex**
 - **Hair/eye color**
 - **Weight**
 - **Height**

TIP--IMPROVING THE ODDS That the Order Gets into TCIC

Identifying information available from:

- **Accused**
- **Court's own observation of accused**
- **Police report/affidavit/other official document**
- **Witness**
- **Personal bond**
 - **Art. 17.04 , CCP.** To be granted personal bond, the accused must provide the following identifying information: name, address, place of employment, date and place of birth, height, weight, color or hair and eyes, driver's license number and state of issuance, and name and address of nearest relative.

WHAT'S YOUR ORDER?: Victims' Rights

Under CCP Art. 17.292, what must the magistrate order an accused to do, regardless of whether the order is mandatory or discretionary?

- A. Refrain from threatening a person protected by the order**
- B. Refrain from assaulting a person protected by the order**
- C. Surrender the accused's concealed handgun license**

WHAT'S YOUR ORDER?: Victims' Rights

ANSWER: C

Must order the surrender of any the concealed handgun license.

Except for suspending the concealed handgun license, for both mandatory and discretionary orders, the magistrate has discretion over what provisions to include in the order discretionary.

BUT . . .

REVIEW: Legislative Mandate-- the Magistrate's Duty to Protect

- **Victims of family violence are entitled to protection from harm.**
(CCP Art. 5.01)
- **The magistrate *shall* protect the victim, regardless of the relationship between the alleged offender and the victim.**
(CCP Art. 5.01)
- **Victim has the right to have the magistrate consider the safety of the victim and the community in setting amount of bond.**
(CCP art. 56.02(a)(2))

REVIEW: Magistrate's Powers to Fulfill the Mandate to Protect

Magistrate has power to:

Issue a Magistrate's Order with protective conditions on court's own motion (*CCP Art. 17.292(a)*);

AND

Impose *any reasonable condition* of bond related to the safety of a victim of the alleged offense or the safety of the community. (*CCP Art. 17.40*)

WHAT'S YOUR ORDER: Victims' Rights



WHAT'S YOUR ORDER?: Setting Bond



Did Ralph commit a predicate crime?

Class C misdemeanor assault:

- **Threatening another with imminent bodily injury**
- **Offensive contact**

How will the amount of Ralph's bond be determined?

REVIEW: Considerations In Setting Bond

In setting bond, the magistrate should consider:

- **Victim and community safety**

(CCP arts. 17.15(5) and 56.02(a)(2))

- **Violations of prior protective orders and bond conditions**

(CCP art. 17.49(c))

- **Imposing an additional (post-bond) hold to prevent violence**

(CCP art. 17.291)

REVIEW: Considerations in Setting Bond

- **Requiring electronic monitoring by state or victim**
(CCP art. 17.49(b)(3))
- **The victim's list of stay-away locations**
(CCP art. 17.49(c))
- **The victim's security during court proceedings**
(CCP art. 56.02(a)(8))

REVIEW: Safety Provisions for Bonds

Safety (*CCP Art. 17.40*)

Can impose *any* condition reasonably related to victim or community safety

Child victim (*CCP Art. 17.41*)

May restrict access to the child

Home curfew/electronic monitoring

(*CCP Arts. 17.43 and 17.44*)

May restrict and monitor the accused's mobility

Stalking (*CCP Art. 17.46*)

May prohibit an accused from contact with or going to or near the victim or a member of the victim's family or household

Family violence (*CCP Art. 17.49*)

- (1) May prohibit the accused from having contact with or going to or near the victim or a member of the victim's family or household;
- (2) May require the accused to submit to electronic monitoring.

WHAT'S YOUR ORDER: Duty to Protect Alice



**During his appearance before the magistrate,
Ralph states**

**“It was all a big misunderstanding. I’m entitled to
communicate with my wife anyway I want. She never
complained before.”**

**What weight should the magistrate consider
Ralph’s “explanation” in setting bond or deciding
whether to issue the Magistrate’s Order?**

WHAT'S YOUR ORDER?: Bond Conditions for Safety



What conditions could be included in Ralph's bond that would promote Alice's safety?

Any reasonable condition relating to the safety of Alice or the community. (CCP art. 17.40)

Is there an advantage to putting safety conditions in the bond as well as the Magistrate's Order?

Bond conditions usually last longer than Magistrate's Order.

WHAT'S YOUR ORDER?



WHAT'S YOUR ORDER?: Assessing Credibility



- After Granny's arrest, Cousin Pearl requests a Magistrate's Order to restrain Granny from further violence against her.
- Cousin Pearl claims she and Granny are members of the same family.
- Granny denies a blood tie to Pearl; Pearl is only related to Jed, who is Granny's son-in-law.

WHAT'S YOUR ORDER: Assessing Credibility

**Estimated incidence of psychopathy
in general population***

1 in 25

- Martha Stout, Ph.D., *The Sociopath Next Door*, MJF Books 2005

WHAT'S YOUR ORDER: Assessing Credibility

**Incidence of diagnosed psychopaths in
group of family violence perpetrators****

1 in 4

**Robert Hare, Ph.D., *Without Conscience*, Guilford Press
1993

WHAT'S YOUR ORDER: Assessing Credibility

Key character traits of psychopaths:

- **Lack remorse or empathy**
- **Proficient and unscrupulous liars**
- **Manipulative, glib, superficial**
- **Impulsive, lack self-control or responsibility**

WHAT DO YOU MEAN BY?: Controlling Definitions

What definitions control whether Cousin Pearl qualifies for a Magistrate's Order?



- **FAMILY**
- **FAMILY VIOLENCE**
- **FAMILY VIOLENCE OFFENSE**
- **DATING RELATIONSHIP**
- **DATING VIOLENCE**
- **DEADLY WEAPON**
- **INTIMATE PARTNER**

WHAT DO YOU MEAN BY ?:

Controlling Definitions-where to find

- **Texas Family Violence Bench book Ch. 2**
- **Magistrate's Order in the TMCEC Form Book**
- **Texas Family Code Chapter 71**

WHAT DO YOU MEAN BY?

Controlling definitions-highlights

- **“Family” means persons related by consanguinity or affinity, former spouses, and parents of same child. It also means a member of the same household (*Fam. Code 71.002*)**
- **“Family Violence” includes dating violence (*Fam. Code § 71.004*)**
- ***NEW* “Dating Violence” now includes assault on person who is a romantic rival if the rivalry motivated the assault (*Fam. Code § 71.0021*)**

WHAT'S YOUR ORDER?: Controlling Definitions



Based on the information you have from Cousin Pearl and Granny, does Pearl qualify for a Magistrate's Order?

- **A. Yes**
- **B. No**
- **C. Maybe; cannot tell based on the facts stated.**

WHAT'S YOUR ORDER?: Controlling Definitions



ANSWER: C

For instance, Pearl would qualify if she can prove she is a member of the Clampett household.

WHAT DO YOU MEAN BY?: Family Violence Offense

Family Violence is an element of the offense:

- **Penal Code § 22.01(b)(1) and (b-1)
(family violence assault)**
- **Penal Code § 22.02(b)(1)
(family violence aggravated assault)**

Under Penal Code Title 5 (Offenses Against the Family), an offense involving family violence can be established by either intrinsic or extrinsic evidence. (CCP Art. 42.013)

WHAT DO YOU MEAN BY?:

Dating violence

- **Ralph now dates Alice, who formerly dated Ed.**
- **A jealous Ed assaults Ralph.**
- **During the assault, Ed waives a gun.**
- **Ed is arrested for assault.**



WHAT DO YOU MEAN BY?: Dating violence

At Ed's magistration, *must* the judge impose a Magistrate's Order to protect Ralph from Ed?

- **A. Yes, the Magistrate's Order is mandatory.**
- **B. Yes, but only if Ralph requests the Magistrate's Order.**
- **C. No, Ralph does not qualify for the Magistrate's Order.**



WHAT DO YOU MEAN BY?: Dating violence



ANSWER: A

The order is mandatory.

Because Ed's assault was motivated by jealousy about Ralph and Alice, Ralph is a victim of a dating violence assault.

Dating violence is a type of family violence.

Because Ed displayed a deadly weapon during the assault involving family violence, the Magistrate's Order is mandatory under CCP art. 17.292(b)(2).

REVIEW:

Firearms Possession

- **State law: Discretionary**
 - Magistrate *may* forbid an accused from possessing a firearm unless the person is licensed peace officer in full time employment by state agency or political subdivision (*CCP art. 17.292 (c)(4)*)
 - **Except: Mandatory suspension of state concealed handgun license (*CCP art. 17.292(l)*)**
- **Federal: Applies automatically if the order protects an intimate partner and meets other criteria to be a qualifying order**

REVIEW: Federal Firearms Possession Prohibition

Qualifying protective order:

- **Issued after notice and an opportunity for a hearing; and**
- **Prohibits harassing, stalking, or threatening another who is**
- **The accused's intimate partner or the intimate partner's child**

AND

REVIEW: Federal Firearms Possession Prohibition

- **The order contains a finding the accused poses credible threat of physical harm to protected persons**

OR

- **Prohibits use, attempted use, or threat of physical force capable of inflicting bodily injury to the protected persons.**

18 USC §§ 921 and 922(g)(8)

WHAT'S YOUR ORDER: Firearms possession



WHAT'S YOUR ORDER?: Firearms Possession



- **Archie asks for and receives a Magistrate's Order against Edith.**
- **The Magistrate's Order does not specifically order Edith not to possess firearms.**

WHAT'S YOUR ORDER: Federal Firearms Possession



Under federal law, can Edith legally possess a firearm or ammunition for the duration of the Magistrate's Order?

- **Did she have notice and an opportunity to be heard?**
- **Is she restrained from harassing, stalking or threatening Archie?**
- **Is Archie her intimate partner? AND**

WHAT'S YOUR ORDER: Federal Firearms Possession



- **Is she a credible threat to Archie's physical safety?;**

OR

- **Is she prohibited from using, attempting to use, or threatening bodily harm to Archie?**

REVIEW: Protective Order Jurisdiction

Municipal Courts have explicit or potential jurisdiction over Magistrate's Orders of Emergency Protection and what other type of protective order?

- **A. Human Trafficking (CCP Art. 7B)**
- **B. Sexual assault (CCP Art. 7A)**
- **C. Stalking (CCP Aart. 6.09)**

REVIEW:

Protective Order Jurisdiction

ANSWER: C

CCP art. 6.09. statute reads “at any proceeding related to an offense under PC § 42.072 in which the defendant appears before the court” and statute does not otherwise mention types of courts having jurisdiction.

REVIEW: ASSESSING LETHALITY

The Top Five Risk Factors

(#)- factor by which the victim's risk of homicide is increased relative to other domestic violence victims.

- 1. WEAPON—use or threat to use a gun, knife, or other weapon**

20.2x

- 2. THREATS— threats to kill or injure the victim**

14.9x

REVIEW: ASSESSING LETHALITY

The Top Five Risk Factors

3. **CHOKING**—attempt to strangle (choke) the victim

9.9x

4. **JEALOUSY**-- violent or constant jealousy of victim

9.2x

5. **FORCED SEX**—forced victim to have sex?

7.6x

- <https://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf>

WHAT'S YOUR ORDER: Lethality Assessment



WHAT'S YOUR ORDER?: Assessing Lethality

- **Weapon**
- **Threats**
- **Choking**
- **Jealousy**
- **Forced sex**



Is Al Bundy potentially homicidal?

WHAT'S YOUR ORDER: Peg's Safety

Predicate offense:

Class C assault—threatening
imminent bodily injury

Lethality factor:

14 x --threat to kill or injure

Victim safety:

Reasonable bonds conditions for Peg's safety can be imposed.



RESOURCES: Judicial

Office of Court Administration's Domestic Violence Resources (DVR) Program

DVR Program offers the following resources:

- Domestic Violence Resource Attorney (DVRA)
<http://www.courts.state.tx.us/oca/DVRA/dvra-home.asp>
- Texas Family Violence Benchbook
<http://www.courts.state.tx.us/oca/DVRA/tfvbb.asp>

RESOURCES: Judicial

DVRA CONTACT INFORMATION

Kim Piechowiak

Office of Court Administration

205 W. 14th Street, Suite 600

Austin, Texas 78701-1614

(512) 936-6390

Kim.Piechowiak@txcourts.gov

RESOURCES: Judicial

Texas Family Violence Benchbook

THE STATE OF TEXAS



THE TEXAS FAMILY VIOLENCE BENCHBOOK

September 2011 EDITION

A READY REFERENCE MANUAL PREPARED FOR
THE JUDGES OF THE STATE OF TEXAS

PREPARED BY THE
OFFICE OF COURT ADMINISTRATION

205 West 14th Street, Suite 600
Tom C. Clark Building (78701)
P.O. Box 12066
Austin, Texas 78711-2066
512/463-1625
FAX: 512/463-1648
www.courts.state.tx.us

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RESOURCES: Judicial

TMCEC Form Book

- **Magistrate's Order (with definitions)**
- **Clerk's Letter regarding Magistrate's Order**
- **Motion to Modify the Magistrate's Order**
- **Order Modifying Magistrate's Order**

RESOURCES: Victim Safety

- **Consider having handout or brochure available in court for victims that provides contact information, such as:**
 - **Local prosecutor's offices**
 - **Hotlines: family violence, sexual assault, and stalking**
 - **Local family violence shelters**
 - **Local legal aid offices**
 - **Other advocacy groups**

Speaker's Contact Information

- Judge Jan Blackstock Matthews
lubbock7@gmail.com
- Kim Piechowiak
kim.piechowiak@txcourts.gov
- Ann Landeros
aland1010@aol.com



