

# Defending a Domestic Violence Contempt Case

## A Primer for Assigned Counsel

**Written by the Working Group on *Pro bono* Attorney Training  
Materials—Domestic Violence Contempt Matters**

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*Note: This document is provided as a reference tool for attorneys who are appointed via the Madden v. Delran list. It is current through the date of publication. It does not replace the attorney's own research and evaluation of the legal and procedural issues involved. An attorney has an ongoing duty to be informed of current law, cases, and Court Rules.*

**Revised December 15, 2017**

## **Acknowledgements**

The current Working Group would like to acknowledge the efforts of the prior Working Group members who drafted the original manual. This earlier document served as an important foundation for the current, updated version.

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## CHAPTER 1 - OVERVIEW

You have received a *pro bono* domestic violence contempt case assignment – your client has been charged with violating a restraining order ... *what happens next?*

The initial steps for any domestic violence disorderly persons offense case involve obtaining information on the case and contacting your client. These first steps are set forth below.

Additionally, there are several paths that a defendant charged with a domestic violence disorderly persons offense may take through the criminal justice system, depending on the facts of the case. An attorney's responsibilities will vary depending on which path the defendant is travelling. For instance, it is possible that your client has been detained as part of criminal justice reform. An overview of these various routes through the justice system and your required involvement in each are provided in Appendix E.

### A. Quick First Steps - Obtaining Information and Contacting Your Client

1. After receiving your *pro bono* assignment from the vicinage *pro bono* coordinator, you will likely be contacted by a member of the Judiciary's Family Division staff and provided with the necessary paperwork (either electronically or in paper form) for the case.
2. Review this manual for an overview of the legal issues involved, as well as conduct your own research and consider accessing resources provided in the manual's appendix.
3. Contact your client to introduce yourself and explain that you will be assuming responsibility for his/her case. If you need assistance with reaching your client, you may contact the county *pro bono* coordinator who assigned you the case (phone numbers and addresses of the coordinators are found on the Judiciary's public website, [www.njcourts.gov](http://www.njcourts.gov) under "attorneys" and under "*pro bono*"). Information on how to contact an incarcerated client is provided in the FAQ section in this manual.
4. Arrange a meeting with your client (by phone or in person). At that meeting, obtain relevant information from your client that may support the case, including documentation that may be presented to the court as evidence. If your client is detained pretrial, determine if he/she wishes to appeal the order of detention. See Appendix E.
5. Inform your client of the potential consequences of a conviction for a domestic violence offense, including the mandatory forfeiture of firearms and firearms purchaser identification card and a lifetime ban on firearms possession, N.J.S.A. 2C:25-27(c), and the need to provide a DNA sample, N.J.S.A. 53:1-20.17.
6. Inform your client of legal recourse available if he/she is found guilty in the domestic violence contempt matter (i.e., appeal). See Appendix C, Appellate Forms.

## CHAPTER 2 – ASSIGNMENT

You have been assigned to represent an indigent defendant charged with violating a domestic violence restraining order. The purpose of this chapter is to explain how you were assigned a *pro bono* case.

In Madden v. Delran, 126 N.J. 591 (1992), the Supreme Court reaffirmed the bar's duty to represent indigent defendants without pay where the Legislature has made no provision for the Public Defender to represent defendants who are entitled to counsel. The Court recognized that it was placing a burden on the bar that should be more generally shared by the public at large. The Court said: "We realize it is the bar that is bearing the burden . . . We trust that the bar understands the strong policy considerations that have persuaded us. As has so often been the case, it is the bar that makes the system work, often without compensation." Id. at 614.

Attorneys are most frequently assigned from the mandatory *pro bono* list to represent defendants who have been charged with contempt of a domestic violence restraining order as defined in N.J.S.A. 2C:29-9(b), a disorderly persons offense. Although disorderly persons offenses are normally heard in municipal court, these contempt charges are heard in the Family Part of the Chancery Division of the Superior Court. N.J.S.A. 2C:25-30. Since the charge does not meet the legal criteria for the assignment of a public defender, assignment from the *pro bono* list is appropriate under Madden v. Delran.

Attorneys are assigned *pro bono* cases through the *pro bono* computer system, which was developed, and is currently maintained, by the Administrative Office of the Courts. The Supreme Court in Madden chose the current system of *pro bono* assignments in an effort to spread the burden among as many attorneys as possible. The system maintains a list of attorneys eligible for *pro bono* assignment in each county. The attorneys are assigned cases in the order mandated by the Supreme Court in Madden. That is, the attorneys are ordered by the number of *pro bono* cases the attorney has handled in the past and then alphabetically. As such, at the top of the list are the attorneys who have never handled a *pro bono* case, in alphabetical order. Next on the list are attorneys who have only handled one case, in alphabetical order, etc. Attorneys are called upon whenever their name reaches the top of the list, and a letter of notification is sent via email or a phone call to the attorney is attempted. The number of *pro bono* cases an attorney is required to handle depends on the number of attorneys in the county and the number of *pro bono* assignments in that county.

When the county *pro bono* coordinator needs to assign a *pro bono* case, he or she requests a name and the computer generates the next name on the list. Attorneys are not required to perform a certain number of *pro bono* hours per year. Rather, attorneys are required to complete an assigned *pro bono* case, no matter how many hours that may require.

Rule 2:7-2(d) governs the extent of the *pro bono* attorney's obligation on appeal. That rule provides:

Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise his or her right to appeal. An attorney filing a notice of appeal shall

be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal.

If the defendant is being prosecuted in municipal court for a related disorderly persons offense, such as simple assault, the *pro bono* attorney is **not** responsible for representing the defendant in that matter. The municipal public defender will represent the indigent defendant in municipal court.

An attorney in New Jersey is responsible for mandatory *pro bono* service unless he or she fits within one of the exemption categories established by the Supreme Court. Currently 11 exemption categories are referenced by numbers 81-91. Most of these categories relate to various kinds of government service, but there are also exemptions for retired attorneys (exemption code 86), attorneys who do other types of *pro bono* service (exemption code 88), and out-of-state attorneys (exemption code 90). As part of the annual attorney registration each spring, attorneys are asked to fill out the *pro bono* questionnaire, in which they certify to their exemption status.

## CHAPTER 3 - CONTEMPT

The law of contempt is derived from common law, statutes, rules of court, and judicial decisions. Contempt includes disobedience of a judicial or protective order. The essence of the offense is defiance of public authority. In the context of domestic violence, contempt is based upon a violation of a restraining order pursuant to N.J.S.A. 2C:29-9(b)(1) and (2), which reads as follows:

b. (1) Except as provided in paragraph (2) of this subsection, a person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order entered under the provisions of the “Prevention of Domestic Violence Act of 1991,” P.L.1991, c. 261 (C.2C:25-17 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States when the conduct which constitutes the violation could also constitute a crime or a disorderly persons offense.

Orders entered pursuant to paragraphs (3), (4), (5), (8) and (9) of subsection b. of section 13 of P.L.1991, c. 261 (C.2C:25-29) or substantially similar orders entered under the laws of another state or the United States shall be excluded from the provisions of this paragraph.

(2) In all other cases a person is guilty of a disorderly persons offense if that person purposely or knowingly violates an order entered under the provisions of the “Prevention of Domestic Violence Act of 1991,” P.L.1991, c. 261 (C.2C:25-17 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States.

Orders entered pursuant to paragraphs (3), (4), (5), (8) and (9) of subsection b. of section 13 of P.L.1991, c. 261 (C.2C:25-29) or substantially similar orders entered under the laws of another state or the United States shall be excluded from the provisions of this paragraph.

A violation of this statute can constitute either a fourth degree crime or a disorderly persons offense. Many times the offense is charged as a fourth degree crime and is downgraded by the County Prosecutor. When the charge is a disorderly persons contempt, or downgraded to such, the complaint is prosecuted by the County Prosecutor in the Family Part, Chancery Division of the Superior Court. N.J.S.A. 2C:25-30.<sup>1</sup> Since an indigent defendant charged with a disorderly persons contempt may be subject to significant fines or a term of incarceration, he/she is entitled to the appointment of *pro bono* counsel.

<sup>1</sup> Rule 5:-1 provides:

The rules in Part V shall govern family actions; all family actions shall also be governed by the rules in Part I insofar as applicable. Civil family actions shall also be governed by the rules in Part IV insofar as applicable and except as otherwise provided by the rules in Part V. Criminal and quasi-criminal family actions shall also be governed by the rules in Part III insofar as applicable except as otherwise provided by the rules in Part V. Juvenile delinquency actions shall be governed by the rules in Part III insofar as applicable and except as otherwise provided by the rules in Part V.

## **A. Elements of the Offense**

Defendants charged with contempt are presumed to be innocent of the offense unless proven guilty. N.J.S.A. 2C:1-13(a). In order for defendant to be found guilty of the disorderly persons offense of contempt, the State has the burden of proving beyond a reasonable doubt<sup>2</sup> the following three elements:

1. There was a court order entered under the provisions of the "Prevention of Domestic Violence Act of 1991"<sup>3</sup> or a substantially similar statute under the laws of another state or the United States;
2. The defendant knew of the existence of the order; and
3. The defendant purposely or knowingly violated a provision of the order.<sup>4</sup>

Violations of terms of a restraining order entered under N.J.S.A. 2C:25-29b(3), (4), (5), (8), and (9) and similar laws of other jurisdictions are not considered to be contempt within the meaning of N.J.S.A. 2C:29-9(b).<sup>5</sup>

In a prosecution for contempt, it makes no difference that the underlying domestic violence restraining order was subsequently rejected, withdrawn, or otherwise dismissed. See State v. Sanders, 327 N.J. Super. 385 (App. Div. 2000).

## **B. Commission of the Offense**

Typically, a disorderly persons contempt offense will involve a situation where the defendant has initiated contact with a victim of domestic violence. The contact is prohibited as it follows the issuance of either a Temporary Restraining Order (TRO) or a Final Restraining Order (FRO). The charge may be initiated by law enforcement officials who have received information related to the violation from the protected victim or another party. If police witness the violation, they will immediately arrest the defendant pursuant to N.J.S.A. 2C:25-31 and prepare a complaint charging contempt. Law enforcement will seek prompt judicial review of the issues related to probable cause and the decision as to whether the charge is placed on a warrant or summons, which will determine whether the defendant is detained until his/her First Appearance. If the defendant is not present, the police will utilize the same procedure and, upon issuance by a judicial officer, will seek to arrest the defendant under the authority of a warrant.

Remember, the underlying act that violates the restraining order does not have to constitute a criminal offense, such as an assault. A defendant may place a phone call or send a text message to the victim in violation of the restraining order, even though the phone call or text message standing alone is not a criminal offense. See State v. L.C., 283 N.J. Super. 441 (App. Div. 1995), certif. denied, 143 N.J. 325 (1996).

<sup>2</sup> N.J.S.A. 2C:1-13a

<sup>3</sup> N.J.S.A. 2C:25-17 to -35

<sup>4</sup> N.J.S.A. 2C:2-2b(1) or (2)

<sup>5</sup> For enforcement of these orders, see N.J.S.A. 2C:25-30.



### **C. No Contact Provision as Part of Pretrial Release**

If the contempt charge is placed on a warrant, there may be a condition prohibiting defendant from having any contact with the alleged victim imposed as part of the initial release at the defendant's appearance at a Centralized First Appearance/Central Judicial Processing court event. This condition is independent of any no contact provision contained in a TRO or FRO. Presumably, the Centralized First Appearance/Central Judicial Processing court will be aware of any TRO or FRO and ensure that conditions of release operate in coordination with the TRO or FRO and do not conflict. An additional condition may be home detention with an electronic ankle bracelet and an exclusion zone around the victim. See Appendix E for more detail regarding the path a defendant takes through the criminal justice system in this area and possible responsibilities of the attorney at each point.

### **D. Defenses**

The defendant may assert a wide variety of factual or affirmative defenses to the contempt charge, including self-defense, necessity, diminished capacity and/or statute of limitations, which for a disorderly persons offense is one year pursuant to N.J.S.A. 2C:1-6b(2). See Appendix A for flow chart of a domestic violence case.

Please note, it is not a defense to a contempt charge that the TRO or FRO was later vacated or dismissed. The State need only prove that the order was in effect at the time of the alleged contempt. See State v. Sanders, 327 N.J. Super. 385 (App. Div. 2000). Nor is it a defense that the victim consented to the contact. The restraining order must be obeyed until the court acts to change, rescind, or dismiss the order. The behavior of the parties to the order cannot serve as a defense. State v. Washington, 319 N.J. Super. 681 (Law Div. 1998).

### **E. Consequences of Conviction**

As assigned attorney, you should advise your client of potential consequences of conviction of the charge against him/her – including all fines, penalties, firearms restrictions, and incarceration exposure.

A disorderly persons contempt is considered to be a petty offense. Accordingly, there is no right to indictment or trial by jury in Family Court. In fact, these offenses are not considered crimes under New Jersey law. N.J.S.A. 2C:1-4b. A person who has been convicted of a contempt offense under N.J.S.A. 2C:29-9(b)(2) is subject to the following range of sanctions:

Jail Term up to 180 days	<u>N.J.S.A. 2C:43-8</u>
Fine up to \$1000	<u>N.J.S.A. 2C:43-3c</u>
\$50 VCCO Assessment	<u>N.J.S.A. 2C:43-3.1a(2)(a)</u>
\$75 Safe Neighborhoods Fund	<u>N.J.S.A. 2C:43-3.2a(1)</u>
Term of Probation	<u>N.J.S.A. 2C:45-1a</u>
\$100 DV Surcharge	<u>N.J.S.A. 2C:25-29.4</u>

Defendants convicted of a disorderly persons contempt will also be required to be fingerprinted, if they were not fingerprinted at the time of arrest for this specific offense. N.J.S.A. 53:1-15.

Defendants will also be required to submit DNA and to pay associated costs, if they have not previously provided a DNA sample. N.J.S.A. 53:1-15; N.J.S.A. 53:1-20.20.

Defendants convicted of crimes or offenses involving domestic violence are prohibited from purchasing, owning, possessing, or controlling firearms and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun. N.J.S.A. 2C:25-7. These prohibitions continue for a lifetime.

Any person convicted of a second or subsequent non-indictable domestic violence contempt offense shall serve a mandatory minimum jail term of not less than 30 days. N.J.S.A. 2C:25-30.

## **F. Sentencing**

Sentencing under the New Jersey Code of Criminal Justice for disorderly persons offenses generally involves a weighing of various aggravating and mitigating factors listed in N.J.S.A. 2C:44-1. Of particular importance are aggravating factors related to the defendant's prior record, harm to the victim and the risk that the defendant will commit another offense. There are also aggravating factors specific to domestic violence offenses.<sup>6</sup> Conversely, statutory mitigating factors are related to lack of harm, acts taken under strong provocation and facilitation of the offense by the victim.

In the event the defendant is sentenced to a term of incarceration, he/she is entitled to day-for-day credit for time served pending disposition of the case. See R. 3:21-8 and R. 7:9-3. Moreover, a defendant with no prior record is also entitled to a presumption of non-incarceration upon conviction, unless specific conditions exist. N.J.S.A. 2C:44-1e. However, any person convicted of a second or subsequent non-indictable domestic violence contempt offense shall serve a minimum jail term of not less than 30 days. N.J.S.A. 2C:25-30.

## **G. Companion Offense to Contempt**

On occasion, the contempt charge may be accompanied by other criminal charges for the commission of separate disorderly persons or petty disorderly persons offenses. When this occurs, the contempt and companion offenses will be heard together in Family Court. While sanctions for a disorderly persons offense were explained above, petty disorderly persons offenses carry the following range of sanctions:

Jail Term up to 30 days	<u>N.J.S.A. 2C:43-8</u>
Fine up to \$500	<u>N.J.S.A. 2C:43-3d</u>
VCCO Assessment \$50	<u>N.J.S.A. 2C:43-3.1a(2)(a)</u>
Safe Neighborhoods Fund \$75	<u>N.J.S.A. 2C:43-3.2a(1)</u>
Term of Probation	<u>N.J.S.A. 2C:45-1a</u>
Domestic Violence Surcharge \$100	<u>N.J.S.A. 2C:25-29.4</u>

Defendants convicted of certain petty disorderly persons offenses may also be required to be fingerprinted if they were not fingerprinted at the time of arrest. N.J.S.A. 53:1-15.

<sup>6</sup> See N.J.S.A. 2C:44-1a(14) and (15).

Defendants convicted of crimes or offenses involving domestic violence are prohibited from purchasing, owning, possessing, or controlling firearms and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun. N.J.S.A. 2C:25-7. These prohibitions continue for a lifetime.

Non-citizen defendants convicted of a violation of a restraining order / offense involving domestic violence may be subject to adverse immigration consequences. Please see, Chapter 5, “Plea Conference,” infra.

## **CHAPTER 4 – DISCOVERY**

### **A. Discovery Requests to the Prosecutor Seeking Discovery from the State**

(Your assignment order should provide the information on whom to contact in the prosecutor's office to obtain your discovery). The rule governing discovery in criminal cases is R. 3:13-3.

#### **Rule 3:13-3(a)**

Pursuant to R. 3:13-3(a), when the prosecutor has made a plea offer, defense counsel may ask the prosecutor to inspect and copy or photograph any relevant and discoverable material.

#### **Rule 3:13-3(b)**

Pursuant to R. 3:13-3(b), defense counsel should request from the prosecutor, in writing, a discovery package of all relevant and discoverable material, including, but not limited to, the following:

1. Complaint or CDR (Complaint Disposition Record);
2. Copy of Temporary Restraining Order (TRO) or Final Restraining Order (FRO); and Proof of Service, if available;
3. Police Report(s) and any witness statements;
4. Affidavit of Probable Cause;
5. Defendant's criminal history (rap sheet);
6. Any other records which may either incriminate or exculpate the defendant, including cell phone records or email messages;
7. Public Safety Assessment (PSA);
8. Preliminary Law Enforcement Investigative Report (PLEIR); and
9. Central Judicial Processing (CJP) Pretrial Release Order with conditions.

### **B. Inspection**

#### **Rule 3:13-3(c)**

Pursuant to R. 3:13-3(c), the prosecutor shall permit the defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package:

1. Books, tangible objects, papers or documents obtained from or belonging to the defendant;
2. Records of the defendant's statements or confessions and a summary of the defendant's admissions against interest that are not recorded but are known to the prosecutor;
3. Results or reports of physical or mental exams or scientific tests or experiments made in connection with the matter that are within the possession, custody, or control of the prosecutor;
4. Reports or records of the defendant's prior convictions;
5. Books, papers, documents, tangible objects, buildings, or places within the possession, custody or control of the prosecutor;

6. Names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information which may lead to them being called as a witness in the case;
7. Records of statements of any persons named above in subsection (6) which are within the possession, custody, or control of the prosecutor and any relevant record of those persons' prior convictions;
8. Police reports within the possession, custody, or control of the prosecutor; and
9. Names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report of such an expert witness, or, if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

### **C. Seeking Discovery to Support a Defense:**

#### **1. You want to seek discovery of any evidence that may show that the complaint is:**

- a. Legally insufficient (i.e., failure to charge a crime);
- b. Factually insufficient (i.e., the evidence in support of the complaint is insufficient, inadequate, or incompetent); or
- c. Based on unconstitutional State conduct.

If the evidence you obtain shows legal or factual insufficiency of the complaint, you should file a motion to dismiss the complaint.

You also want to seek discovery of any evidence that will show that the complaint is based on the State's conduct that either grossly violates the defendant's constitutional rights or is otherwise fundamentally unfair. If you obtain evidence that shows such prosecutorial or police misconduct, you should file a motion to dismiss.

You want to seek any discovery that would show that the defendant was never served with the restraining order at issue or that would show that the defendant lacked requisite knowledge of the restraints. N.J.S.A. 2C:29-9 (b) provides: "a person is guilty of a disorderly persons offense if that person **purposely or knowingly** violates an order entered under the provisions of the 'Prevention of Domestic Violence Act of 1991,' P.L.1991, c.261 (C.2C:25-17 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States." (emphasis added).

#### **2. Discovery of Exculpatory Evidence**

You want to seek discovery of any exculpatory evidence, and you should file a motion to dismiss if the prosecutor failed to present to you any exculpatory evidence in its possession. State v. Hogan, 144 N.J. 216, 236-239 (1996); State v. Womack 145 N.J. 576, cert. denied, 519 U.S. 1011 (1996).

## D. Discovery to Support Other Defenses

You should seek discovery of any evidence that could support any other viable defense, such as a lack of jurisdiction or double jeopardy.

When appropriate, you should also seek discovery of any evidence that will support other Code defenses, including:

1. De minimis Claim. If the discovery shows that the violation could be considered de minimis, you should file a motion to dismiss the complaint. (Only the Assignment Judge may dismiss a prosecution pursuant to the *de minimis* statute). State v. Vitiello, 377 N.J. Super. 452, 455 (App. Div. 2005); Pressler, Current N.J. Court Rules, comment 3.5 on R. 3:10-2 (2017);
2. Defense of Another. If defendant had a reasonable belief in the need to use force to protect another. State v. Colon, 298 N.J. Super. 569, 576 (App. Div.), certif. denied, 150 N.J. 27 (1997);
3. Duress. If the defendant was coerced into committing conduct in circumstances that a person of reasonable firmness could not be expected to withstand. N.J.S.A. 2C:2-9(a); State v. B.H., 183 N.J. 171, 193 (2005);
4. Entrapment. See State v. Johnson, 127 N.J. 458, 464-475 (1992); State v. Florez, 261 N.J. Super. 12, 27-28 (App. Div. 1992), aff'd, 134 N.J. 570 (1994);
5. Intoxication. Involuntary or pathological intoxication is an affirmative defense under the Criminal Code. See State v. Sette, 259 N.J. Super. 156, 169-171 (App. Div.), certif. denied, 130 N.J. 597 (1992). However, voluntary intoxication is not a defense under the Code unless it negates an element of the offense. State v. Warren, 104 N.J. 571, 577 (1986). For example, voluntary intoxication may be a defense to a disorderly persons contempt charge, because it has a knowing mental element;
6. If the defendant reasonably but mistakenly believes facts that negate the culpability element of an offense. State v. Sexton, 160 N.J. 93, 106-07 (1999);
7. Necessity. N.J.S.A. 2C:3-2(a);
8. Renunciation of Purpose in a Conspiracy. N.J.S.A. 2C:5-2(e);
9. Self-Defense. State v. O'Neil, 219 N.J. 598 (2014);
10. Statute of Limitations. R. 3:10-2 (2017);
11. Third Party Guilt. A defendant has a constitutional right to attempt to prove his or her innocence by proving that the crime was committed by a third party. State v. Fortin, 178 N.J. 540, 590-591 (2004); State v. Jimenez, 190 N.J. 397 (2006).

## E. Defendant's Competency

If appropriate, you may need to explore whether the defendant is competent to plead guilty or stand trial. N.J.S.A. 2C:4-4 provides that “no person who lacks capacity to understand the proceedings against him/her or who cannot assist in their own defense shall be tried, convicted or sentenced for the commission of an offense as long as the incapacity is present.” N.J.S.A. 2C:4-5 provides: “If there is reason to doubt the defendant’s ability to proceed, the prosecutor, defense counsel or the

court on its own motion, may seek to appoint a qualified psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant.” The findings of this evaluation may determine the disposition of the charges. N.J.S.A. 2C:4-6.

#### **F. Discovery to Determine Competency of State’s Witnesses**

In some instances, a defendant may challenge the mental status of the State’s witnesses, see State v. Franklin, 49 N.J. 286, 287-88 (1967), and even may challenge the mental competency of a victim. See State v. Olivio, 123 N.J. 550, 552-53 (1991).

#### **G. Reciprocal Discovery Obligations that Defense Counsel Owes to the State**

Under certain circumstances, the defendant has reciprocal discovery obligations and must provide notice to the prosecution if he/she intends to assert affirmative defenses.

##### **1. Written Notice of Affirmative Defenses:**

Pursuant to R. 3:12-1, no later than seven days before the arraignment or status conference, a defendant must serve on the prosecutor written notice of either an intention to claim affirmative defenses or an intention to rely on the following sections of the Code of Criminal Justice including the following:

- a. Duress, N.J.S.A. 2C:2-9;
- b. Entrapment, N.J.S.A. 2C:2-12;
- c. Ignorance or Mistake, N.J.S.A. 2C:2-4;
- d. Intoxication, N.J.S.A. 2C:2-8;
- e. Insanity, N.J.S.A. 2C:4-1. In State v. Worlock, 117 N.J. 596, 606-15 (1990), the Court reaffirmed the State’s adherence to the M’Naghton Rule to determine legal insanity. Note: the defendant’s burden of proof of insanity is by only a preponderance of the evidence. State v. Lewis, 67 N.J. 47, 48 (1975);
- f. Justification, N.J.S.A. 2C:3-1 to -11; and
- g. Lack of Requisite State of Mind (Mental disease or defect), N.J.S.A. 2C:4-2.

A defendant’s burden of proof is to raise a reasonable doubt as to his mental capacity to form intent. N.J.S.A. 2C:4-2; State v. Johnson, 120 N.J. 263, 299-300 (1990); State v. Murray, 240 N.J. Super. 378, 398 (App. Div.), certif. denied, 122 N.J. 334 (1990). In State v. Galloway, 133 N.J. 631, 647 (1993), the Court held that “all mental deficiencies, including conditions that cause a loss of emotional control, may satisfy the diminished capacity defense if the record shows that experts in the psychological field believe that that kind of mental deficiency can affect a person’s cognitive faculties, and the record contains evidence that the claimed deficiency did affect the defendant’s cognitive capacity to form the mental state necessary for the commission of the crime”.

## **2. Notice of Alibi**

Pursuant to R. 3:12-2, the defendant is required to provide to the prosecutor written notice of intent to use an alibi defense.

Note: A defendant is not required to provide the State with notice of any defenses not covered by R. 3:12-1 or R. 3:12-2.

## **H. Depositions**

Pursuant to R. 3:13-2, if it appears that a material witness is likely to be unable to testify at trial because of death, physical, or mental incapacity, defense counsel may make a motion, with notice to the parties, for a deposition of the witness and for the production of designated books, and non-privileged papers, documents, or tangible objects to be produced at the same time and place.

The deposition must be videotaped unless the court orders otherwise, R. 3:13-2(b), and may be used at trial in lieu of the live testimony of the witness in open court if the witness is unable to testify because of death or physical or mental incapacity or if the court finds that the party offering the deposition has been unable to procure the attendance of the witness by subpoena or otherwise. R. 3:13-2(c).



## CHAPTER 5 – PLEA CONFERENCE

### A. Overview

Your first appearance in court will typically be at the plea conference. By this time, you should have already received the discovery from the prosecutor. If not, the prosecutor will provide the discovery to you at the conference. This may also be your first occasion to meet with your client, especially if he or she is in jail. You should read over the discovery, discuss the case with your client, and then meet with the prosecutor. Upon your arrival in court, you should introduce yourself to the prosecutor.

The prosecutor will make a plea offer to resolve the case. You will then privately discuss the plea offer with your client.

### B. Consequences of a Guilty Plea

You must fully advise your client of the plea and the consequences of accepting it. It has been held that if defense counsel fails to adequately communicate a plea offer to a defendant, that such is *prima facie* evidence of inadequate representation of counsel. State v. Powell, 294 N.J. Super. 557 (App. Div.1996). Please refer to Chapter 3, “Contempt” for a listing of sanctions.

As indicated in the previous chapters, the relevant charging statute for contempt of a restraining order is N.J.S.A. 2C:29-9(b). A defendant who is found guilty of contempt may be sentenced to up to six (6) months in the county jail. It is important that you advise your client that **if there is a second or subsequent guilty plea or conviction for contempt, the defendant must serve a minimum of not less than thirty (30) days in the county jail.** N.J.S.A. 2C:25-30. However, this is not the case if the defendant is convicted simultaneously of multiple contempt charges even if the conduct occurred on separate occasions.

All clients should be advised that if an individual is not a citizen of the United States, a determination of guilt to a violation of a restraining order or other offense may result in the following:

- It may result in your removal from the United States;
- It may stop you from being able to legally enter or re-enter the United States;
- It may prevent you from ever becoming a naturalized American citizen.

Clients who are not citizens or who are unsure whether they are citizens have the right to seek advice from an attorney about the effect the alleged conduct and participation in the proceeding may have on immigration status.

### C. Prosecutor’s Offer and Court’s Consideration of Aggravating/Mitigating Factors

Typically, for a first offense, the prosecutor will offer a plea of probation. This is fact sensitive, however. Again, depending on the circumstances, the prosecutor may insist on jail time (which would include time the defendant has already served if arrested and jailed on the warrant). The court may impose jail time for a first contempt offense if aggravating circumstances outweigh mitigating circumstances. N.J.S.A. 2C:44-1.

Pursuant to N.J.S.A. 2C:44-1, aggravating circumstances considered by the court are:

1. The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner;
2. The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance;
3. The risk that the defendant will commit another offense;
4. A lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of the public trust under chapters 27 and 30, or the defendant took advantage of a position of trust or confidence to commit the offense;
5. There is a substantial likelihood that the defendant is involved in organized criminal activity;
6. The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted;
7. The defendant committed the offense pursuant to an agreement that he either pay or be paid for the commission of the offense and the pecuniary incentive was beyond that inherent in the offense itself;
8. The defendant committed the offense against a police or other law enforcement officer, correctional employee or fireman, acting in the performance of his duties while in uniform or exhibiting evidence of his authority; the defendant committed the offense because of the status of the victim as a public servant; or the defendant committed the offense against a sports official, athletic coach or manager, acting in or immediately following the performance of his duties or because of the person's status as a sports official, coach or manager;
9. The need for deterring the defendant and others from violating the law;
10. The offense involved fraudulent or deceptive practices committed against any department or division of State government;
11. The imposition of a fine, penalty or order of restitution without also imposing a term of imprisonment would be perceived by the defendant or others merely as part of the cost of doing business, or as an acceptable contingent business or operating expense associated with the initial decision to resort to unlawful practices;

12. The defendant committed the offense against a person who he knew or should have known was 60 years of age or older, or disabled;
13. The defendant, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a stolen motor vehicle;
14. The offense involved an act of domestic violence, as that term is defined in subsection a. of section 3 of P.L.1991, c. 261 (C.2C:25-19), committed in the presence of a child under 16 years of age; and
15. The offense involved an act of domestic violence, as that term is defined in subsection a. of section 3 of P.L.1991, c. 261 (C.2C:25-19) and the defendant committed at least one act of domestic violence on more than one occasion.

Mitigating circumstances considered by the court are:

1. The defendant's conduct neither caused nor threatened serious harm;
2. The defendant did not contemplate that his conduct would cause or threaten serious harm;
3. The defendant acted under a strong provocation;
4. There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;
5. The victim of the defendant's conduct induced or facilitated its commission;
6. The defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained, or will participate in a program of community service;
7. The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;
8. The defendant's conduct was the result of circumstances unlikely to recur;
9. The character and attitude of the defendant indicate that he is unlikely to commit another offense;
10. The defendant is particularly likely to respond affirmatively to probationary treatment;
11. The imprisonment of the defendant would entail excessive hardship to himself or his dependents;

12. The willingness of the defendant to cooperate with law enforcement authorities;
13. The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant.

#### **D. The Defendant Accepts the Plea Offer**

When the case is ready to be presented to the court, the prosecutor and you will be asked to place your appearances on the record. The defendant will then be administered the oath. The prosecutor will place the terms of the plea agreement on the record. You will likely be asked if you concur with the prosecutor's recitation of the plea agreement.

A factual basis for the guilty plea will have to be placed upon the record. In other words, either you or the prosecutor will ask questions of the defendant regarding his or her conduct and the defendant will have to acknowledge his or her guilt. This will be discussed further below. Before doing so, however, the court will make sure that the defendant understands the consequences of the plea.

The court has discretion as to whether or not to accept a defendant's guilty plea. Prior to accepting the plea, the court should first address the defendant as to his or her personal understanding of the charge and the consequences of accepting a plea. When addressing the defendant, the court must question the defendant under oath or by affirmation. State v. Herman, 47 N.J. 73 (1966); State v. Real, 26 N.J. 222 (1958); State v. James, 84 N.J. Super. 109 (App. Div. 1964). The line of questioning is to ensure that the defendant is properly represented and is acting voluntarily, and not under the influence of threats, promises, or inducements not disclosed on the record.

The questions asked of a defendant before the factual basis is taken should cover the following:

1. Whether the defendant understands the charges and the plea;
2. Whether the defendant is pleading guilty freely and voluntarily;
3. Whether the defendant understands that by pleading guilty, certain rights are forfeited, including but not limited to:
  - a. The right to a trial, where the State must prove one guilty beyond a reasonable doubt,
  - b. The right to remain silent,
  - c. The right to confront the witnesses;
4. Whether the defendant understands by pleading guilty, he or she will:
  - a. Have a criminal record,
  - b. Pay a VCCO fine of \$50 for each count to which they are pleading guilty,
  - c. Pay a transactional fee of \$1.00 for each occasion when making a payment or installment payment for any offense, and a transactional fee of \$2.00 for each occasion when making a payment or installment payment for any offense and the sentence is to probation, or otherwise requires payments of financial obligations to the probation division,

- d. Pay a Safe Neighborhood Services Fund assessment of \$75 for each docket under which they are pleading guilty,
  - e. Pay a surcharge of \$100 for each guilty plea to one of the 19 criminal code statutes set forth at N.J.S.A. 2C:25-19,
  - f. Pay a fee for the term of probation;
5. Whether the defendant's assigned counsel answered all questions and if the defendant is satisfied with advice received from counsel;
  6. Whether the defendant is under the influence of any alcohol, drug, or other mind-altering substance which would affect the defendant's ability to understand the plea or the proceedings; and
  7. Whether the defendant has any questions concerning the plea.

Again, the requirements for accepting a plea require a determination that the plea was entered into freely and voluntarily. The defendant must have adequate representation. The judge will take into account the mental state of the defendant. A plea is not automatically deemed involuntary because defendant may be under the influence of a prescription medication. State v. Clark, 104 N.J. Super. 67, 70 (Law Div. 1968), aff'd, 110 N.J. Super. 562 (App. Div.), certif. denied, 57 N.J. 135 (1970), and State v. Miles, 229 N.J. 83 (2017).

Under State v. McIlhenny, 357 N.J. Super. 380, 384-85 (App. Div.), certif. denied 176 N.J. 430 (2003), there must be full prosecutorial disclosure, an adequate factual basis, with the plea being entered voluntarily; there is no requirement that the judge accepting the plea be aware of all exculpatory material in the investigation.

In addition to the voluntary requirement when accepting a plea, the court is also concerned with the procedural elements. For each crime, the court must conclude that there is a factual basis for every element of the crime being pled. If there is not a factual basis for each element, then the court must reject the plea. State v. Pineiro, 385 N.J. Super. 129, 137 (App. Div. 2006), State v. Nolan, 205 N.J. Super. 1 (App. Div. 1985). A defendant, on appeal, can raise whether or not there was a factual basis for the plea and, if not, it may serve as the basis of an ineffective assistance of counsel claim.

The questions asked of a defendant to establish the factual basis for the guilty plea should cover the following:

1. That the defendant was aware of the existence of the restraining order barring the defendant from having contact or communication with the victim;
2. Whether the defendant violated the restraining order;
3. The circumstances surrounding the violation of the restraining order, including all necessary facts to establish the violation; and
4. If the defendant is also pleading guilty to other charges (i.e., harassment), the defendant must acknowledge that he or she committed the necessary elements of that offense.

After the defendant sets forth an adequate factual basis for the plea of guilt, the court will ask you if you would like to be heard before sentencing. At this time, you can request that any fines be paid over a period of probation (if probation is part of the plea). You can advise the court of any other

relevant facts or circumstances that you believe would impact the court's ultimate decision regarding the plea. The court may also ask the defendant if there is anything he or she would like to say before sentencing. The court will ask the prosecutor the same thing.

Typically, the court will accept the terms of the plea agreement. At the conclusion of this proceeding, the court will discharge any bail posted by the defendant. The defendant will be presented with an appeal rights form at the conclusion of the proceeding. You and the defendant will have to sign the form before you leave.

#### **E. The Defendant Rejects the Plea Offer**

If your client refuses to accept the plea offer, you should advise the prosecutor. Perhaps with some additional discussion, the case can be resolved. If not, the court will set a trial date. As assigned counsel, you will have to handle the trial. See Chapter 6, 'Trial,' infra.

If the defendant rejects the plea offer made by the prosecutor, you and the prosecutor will have to fill out a trial memorandum that will list any anticipated witnesses to be called at trial and set forth any stipulations.

The parties also will appear before the court. The oath will be administered to the defendant. The prosecutor will place the terms of the rejected plea offer on the record. You will be asked if that is your understanding of the plea offer.

The defendant will also be questioned about his or her understanding of the plea offer. The defendant will be made aware of the consequences of rejecting the plea offer and advised of the maximum penalties that may be imposed if the defendant is found guilty of the charge(s). The court will confirm that the defendant wishes to reject the plea.

Any bail posted by the defendant will be continued. The defendant will be reminded that he or she must continue to abide by the restraining order (if it still exists) and any pretrial release conditions. The court will set a trial date, which will be inserted into the trial memorandum. The court will advise the defendant that if there is no appearance at the trial, any bail will be forfeited and a bench warrant will be issued for the defendant's arrest.

#### **F. The Prosecutor's Request to Dismiss**

In some cases, the prosecutor may decide to dismiss the case at the plea conference if he or she is unable to prove the elements of the offense beyond reasonable doubt. This may occur, for instance, if there is no proof that the defendant knew of the existence of the restraining order.

In this event, the parties will appear before the court and the oath will be administered to the defendant. The prosecutor will place the reasons for the request to dismiss on the record.

If the court accepts the dismissal, any bail will be discharged. The defendant will be reminded to abide by the restraining order (if it still exists).

## CHAPTER 6 – TRIAL

As noted in the previous chapter, if the case did not resolve at the plea conference the matter is scheduled for trial. A trial memorandum may have been prepared at the plea conference in which all witnesses were listed. Alternatively, you may be in communication with the prosecutor regarding witnesses the State intends to call at trial. However, you should subpoena any witness you will rely upon at trial. You should not rely on the State to secure your witnesses, as the State is not required to subpoena your witnesses, nor is the State required to subpoena witnesses they have placed on a witness list. You are responsible for ensuring that witnesses you need appear at court.

Before the commencement of trial, you or the State may ask the court to sequester witnesses. This application is made to ensure that witnesses do not hear the testimony of others, thereby impacting their own recollection. The case is heard before a judge – there is no jury, as the defendant is not entitled to a jury.

The prosecutor may make an opening statement and then you will make an opening statement. The prosecutor will call the State's witnesses. You will have an opportunity to cross-examine each of the State's witnesses.

At the end of the State's case, you can make a motion to dismiss if there is insufficient evidence to support a finding of guilt. If that motion is granted, the case is dismissed. If that motion is denied, you should proceed and call your first witness. The prosecutor will be permitted to cross-examine your witnesses.

Under the Fifth Amendment to the United States Constitution, the defendant has the right to remain silent. Therefore, he or she need not testify at the trial. You should advise your client of this.

The State must prove, beyond a reasonable doubt, that the defendant knowingly violated a restraining order or protective order. See State v. S.K., 423 N.J. Super. 540, 546 (App. Div. 2012) (the relevant provision of the order was overly broad and virtually impossible for defendant to obey at all times; also, defendant's testimony was not an adequate factual basis to prove he had violated the order). See also State v. Finamore, 338 N.J. Super. 130, 138 (App. Div. 2001).

After hearing from the witnesses, you will make a closing argument, followed by the prosecutor's closing argument. Depending on the complexity of the matter, the number of witnesses called, and the evidence submitted, the court may request written submissions.

Again, depending on the length and complexity of the case, the court may decide the case immediately from the bench or may prepare a written decision. R. 2:7-2(d) governs the extent of the *pro bono* attorney's obligation on appeal. See Appendix C for forms and other information if you continue with representation of the defendant on appeal.

## **CHAPTER 7**

### **SEXUAL ASSAULT SURVIVOR PROTECTION ACT (SASPA)**

#### **A. BACKGROUND**

The "Sexual Assault Survivor Protection Act of 2015" (SASPA) took effect on May 7, 2016 and was amended January 9, 2017.

SASPA authorizes the court to issue temporary and final protective orders on behalf of victims of "nonconsensual sexual contact," "sexual penetration," or "lewdness," as these terms are defined in the law, or attempts at such conduct.

Under the law, any person alleging to be a victim of nonconsensual sexual contact, sexual penetration, or lewdness, or an attempt at such conduct, who is not otherwise eligible to seek a restraining order as a victim of domestic violence pursuant to the "Prevention of Domestic Violence Act of 1991" may file an application with the Superior Court seeking a temporary protective order.

The application may be filed by a parent or guardian on behalf of a victim when the person is under 18 years of age, or has a developmental disability or is mentally incapacitated to the extent that the person is incapable of providing consent to certain sexual conduct. SASPA is not applicable to situations involving allegations of misconduct against a minor by a parent or guardian when such misconduct is being alleged by the other parent or guardian. Such incidents are instead to be reported to the Division of Child Protection and Permanency in the Department of Children and Families for investigation.

The law clarifies that if the alleged offender is an unemancipated minor, the victim must seek relief pursuant to the provisions of the New Jersey Code of Juvenile Justice. The new law provides that the court may issue a temporary protective order regardless of whether criminal charges related to the incident were filed or disposed.

In addition, the law clarifies that the filing of an application for a temporary protective order does not bar the filing of a criminal complaint or a prosecution for the same act.

Under the law, a judge of the Superior Court is authorized to enter an emergency *ex parte* protective order when necessary to protect the safety and well-being of the alleged victim on whose behalf the relief is sought. A temporary protective order issued under the law remains in effect until further order of a judge of the Superior Court.

Under SASPA, a final protective order issued pursuant to SASPA shall be issued only after a finding or an admission is made that the respondent committed an act of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, against the alleged victim. Once issued, the protective order remains in effect until further order of a judge of the Superior Court.

SASPA provides that a respondent's violation of any protective order issued under its provisions constitutes an offense under a new subsection d. of N.J.S.A. 2C:29-9. Under subsection d., a person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order entered pursuant to SASPA.



## **B. CONTEMPT**

Contempt of a SASPA Protective Order pursuant to N.J.S.A. 2C:29-9d(1) and (2) reads as follows:

(1) Except as provided in paragraph (2) of this subsection, a person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order entered under the provisions of P.L.2015, c. 147 (C.2C:14-13 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States when the conduct which constitutes the violation could also constitute a crime or a disorderly persons offense.

(2) In all other cases a person is guilty of a disorderly persons offense if that person purposely or knowingly violates an order entered under the provisions of P.L.2015, c. 147 (C.2C:14-13 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States.

As used in this section, “state” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by a federal law or formally acknowledged by a state.

If you are representing a client charged with the disorderly persons offense of contempt of a SASPA Protective Order, the procedures outlined in Chapters 3 through 5 should be followed. You should advise your client of the consequences of a conviction (Chapter 3), you should seek discovery from the prosecutor (Chapter 4), and the plea conference and trial will be handled in the same manner as with a charge of contempt of a temporary or final restraining order (Chapters 5 and 6).

## **Case Summaries Related to Domestic Violence Contempt**

The following are many of the cases that may have application in your case. This list is not exhaustive and is current as of December 2017:

### **State v. Castagna, 387 N.J. Super. 598 (App. Div.), certif. denied, 188 N.J. 577 (2006):**

To prove that defendant caused another to make harassing communications on his behalf (1) the defendant must have had a purpose to harass; and (2) the statements to the intermediary must have been made with the purpose that they be passed on to the victim.

### **Finamore v. Aronson, 382 N.J. Super. 514 (App. Div. 2006):**

A defendant may attend a child's activities even when the FRO prohibits defendant contacting plaintiff unless the FRO expressly prohibits attendance at such activities. In this case, "the specific restriction was never ordered. It cannot be inferred or presumed".

### **State v. Smith, 374 N.J. Super. 425 (App. Div. 2005):**

The police may question those present at the scene of domestic violence without giving *Miranda* warnings as long as the inquiries are "reasonably related to confirming or dispelling suspicion and those questioned are not restrained to a degree associated with formal arrest".

### **State v. Ashford, 374 N.J. Super. 332 (App. Div. 2004):**

An indigent defendant is entitled to assignment of counsel when charged with a disorderly persons offense of contempt and criminal mischief. Waiver of right to counsel must be knowing and fully informed and subject to retraction if imprisonment is imposed.

The trial judge must be mindful of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), where an excited utterance by victim as testified to by police officer is insufficient to convict for contempt. The right of confrontation guaranteed by the Sixth Amendment requires that victim be called as a witness if available.

### **State v. Cassidy, 179 N.J. 150 (2004):**

Even if a TRO or FRO fails to meet the "technical and substantive requirements for a restraining order" and therefore is "an invalid order . . . the order nonetheless has legal effect until vacated". (FN 3).

**State v. Lozada, 357 N.J. Super. 468 (App. Div. 2003):**

The trial court erred in failing to sever for trial charges of third-degree stalking and fourth-degree violation of a domestic violence restraining order, and convictions on both offenses were reversed.

**State v. Masculin, 355 N.J. Super. 250 (Ch. Div. 2002):**

A defendant may be found guilty of contempt for violating a TRO even when the municipal judge who issued the order failed to comply with R. 5:7A.

**State v. Brito, 345 N.J. Super. 228 (App. Div. 2001):**

Defendant was charged with contempt for violating FRO. The trial judge dismissed the complaint when complainant failed to appear at the status conference. The dismissal was reversed on the basis that the complaint could not be dismissed for failure of the State's witness (the alleged victim) to appear for a routine status conference even though the notice provided by the court indicated that it would be so dismissed.

**State v. Mernar, 345 N.J. Super. 591 (App. Div. 2001):**

Contempt complaint was dismissed because of the absence of proof of valid service of the TRO by law enforcement. The State appealed dismissal on the basis that defendant had actual notice of the TRO. The charge of violation of TRO was reinstated by the Appellate Division. "[A] contempt action may proceed against the defendant who has actual knowledge of the restraints imposed, even though the injunction [TRO] was not regularly served."

**State v. Finamore, 338 N.J. Super. 130 (App. Div. 2001):**

Defendant's contempt conviction for telephoning victim four times about parenting time was overturned. The parties' 1995 property settlement agreement (entered **after** FRO) was "rife" with provisions that invited or required some sort of contact between the parties.

**State v. Sanders, 327 N.J. Super. 385 (App. Div. 2000):**

Defendant's contempt conviction for violating a temporary restraining order (which was later vacated after trial) was upheld. "An order of the court must be obeyed unless and until a court acts to change or rescind it."

**State v. Krupinski, 321 N.J. Super. 34 (App. Div. 1999):**

Defendant's conviction for contempt was reversed for two reasons. First, defendant was permitted under matrimonial order to go onto property to remove lawnmower. Second, defendant's going onto property to remove lawnmower, delivering children to front door and giving wife car seat, were "trivial, non-actionable events".

**State v. Washington, 319 N.J. Super. 681 (Law Div. 1998):**

Even though parties had reconciled and lived together from October 1996 until December 1997, the August 7, 1995 FRO was valid and continued in effect. The defense that the order was rendered null and void by the reconciliation was rejected. Defendant found guilty of contempt for his May 10, 1998 telephone calls.

**State v. Hoffman, 149 N.J. 564 (1997):**

The Supreme Court overruled the Appellate Division and found that the act of sending in the mail a torn up copy of a court order was an act of contempt, and did constitute a “contact” and was in fact a “communication”.

**State v. Wilmouth, 302 N.J. Super. 20 (App. Div. 1997):**

A defendant cannot be deemed to be in contempt of a domestic violence restraining order where his conduct conforms with the parties’ understanding of the terms of the order, and where his conduct does not, in itself, constitute domestic violence.

**State v. Chenique-Puey, 145 N.J. 334 (1996):**

Severance of contempt charges and other criminal charges may be necessary. Sets forth elements of crime of contempt (4th degree) as follows: (1) a restraining order was entered; (2) defendant violated the order; (3) defendant acted purposely or knowingly; and (4) the conduct that constituted the violation also constituted a crime or disorderly persons offense.

**State v. J.T., 294 N.J. Super. 540 (App. Div. 1996):**

Standing at victim’s property line and staring at her house without speaking is “contact”.

**State v. L.C., 283 N.J. Super. 441 (App. Div. 1995), certif. denied, 143 N.J. 325 (1996):**

Affirmed finding that defendant-wife was guilty of contempt by going to residence of and speaking to husband’s girlfriend who was a protected party.

**State v. Bowser, 272 N.J. Super. 582 (Law Div. 1993):**

Mandatory 30-day sentence for contempt does not apply to defendant who is convicted simultaneously on multiple contempts that occur on separate occasions.

**State v. Nelson, 255 N.J. Super. 270 (Law Div. 1992):**

Delaying Family Part contempt trial to conclusion of criminal trial may be appropriate to avoid prejudice.

**State v. S.K., 423 N.J. Super. 540 (App. Div. 2012):**

Defendant's conviction for violating a domestic violence restraining order vacated and the complaint is dismissed because the provision of the order prohibiting defendant from "any other place where plaintiff is located" was overly broad and not authorized by the Prevention of Domestic Violence Act, and also because defendant did not provide a sufficient factual basis for his guilty plea and conviction.

**State v. D.G.M., 439 N.J. Super. 630, 632 (App. Div. 2015)**

Defendant violated the no contact communication provision of FRO by sitting near and briefly filming the victim at their child's soccer game. In his appeal of a contempt conviction under N.J.S.A. 2C:29-9(b), the Appellate Division held that while such conduct fell within the restraining order's prohibition on communication, the court concluded that defendant could not have fairly anticipated the interpretation. Therefore, in applying the doctrine of lenity, the court reversed defendant's conviction.

**D.N. v. K.M., 216 N.J. 587 (2014):**

Over a dissent, the Supreme Court refused to grant certification to address the question of whether counsel should be appointed for indigent citizens in civil PREVENTION OF DOMESTIC VIOLENCE ACT proceedings, because the victim did not assert that she was indigent, or ask the trial court for appointed counsel.

**S.K. v. J.H., 426 N.J. Super. 230 (App. Div. 2012):**

A trial court erred by granting plaintiff a final restraining order under the PDVA, N.J.S.A. 2C:25-17 to -35, because the single date upon which she and defendant had been on the night of the assault was insufficient to constitute a dating relationship.

**S.P. v. Newark Police Dep't., 428 N.J. Super. 210 (App. Div. 2012):**

Plaintiff and her attacker were boarders in a rooming house. As such, they can be considered "household members" under the PDVA.

**N.G. v. J.P., 426 N.J. Super. 398 (App. Div. 2012):**

Although adult siblings had not lived together since 1960, trial court properly exercised jurisdiction.

**R.G. v. R.G., 449 N.J. Super. 208, 213, 220, 228-30 (App. Div. 2017):**

The 2015 Amendments expanded the jurisdictional scope of the Prevention of Domestic Violence Act so that former household member now includes any person who "was at any time a household member." 1. 2015, f. 98, § 2, eff. Aug. 10, 2015. Consequently, jurisdiction was established even though the two brothers had not resided together in thirty-six (36) years.

**B.C. v. T.G., 430 N.J. Super. 455 (Ch. Div. 2013):**

After learning that plaintiff was pregnant with his child, defendant and four accomplices severely beat her. Trial court entered FRO, restraining defendant's contact with plaintiff, her parents, siblings, and plaintiff's unborn child, upon birth. The trial court held that although plaintiff's fetus was not a "person" under New Jersey law, nothing in the Prevention of Domestic Violence Act precluded the court from entering an order of protection stating that the unborn child, upon birth, was automatically included as an "additional person" protected from defendant.

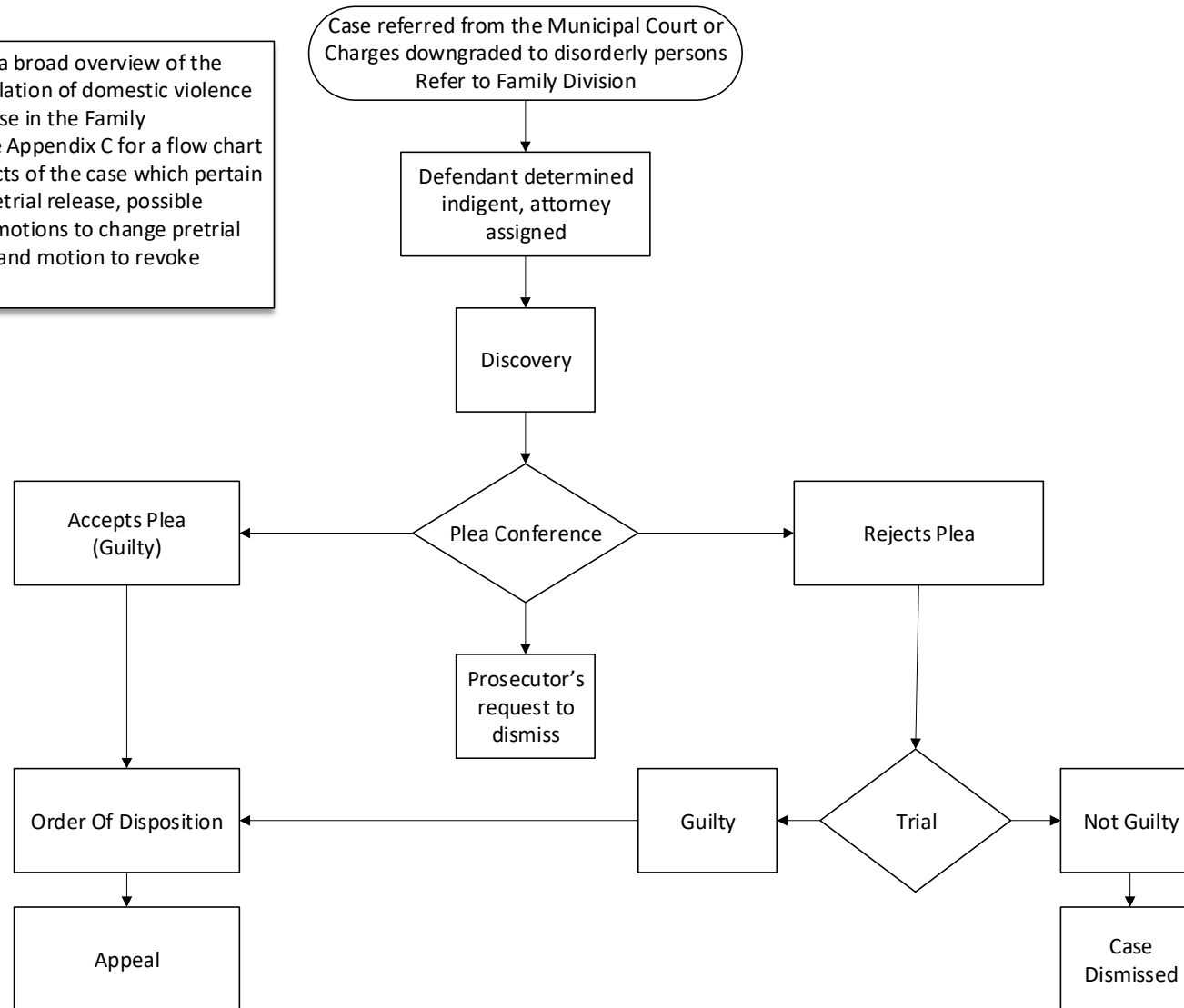
**J.S. v. D.S., 448 N.J. Super. 17, 23 (App. Div. 2016):**

Restraining order cannot be entered by consent or without a factual foundation. Trial court must elicit a factual foundation even where defendant agrees to entry of a restraining order.

## Appendix A

### FAMILY DIVISION DOMESTIC VIOLENCE CONTEMPT CASE FLOW

This chart provides a broad overview of the progression of a violation of domestic violence restraining order case in the Family Division. Please see Appendix C for a flow chart of the pretrial aspects of the case which pertain to: conditions of pretrial release, possible pretrial detention, motions to change pretrial release conditions, and motion to revoke pretrial release.



## APPENDIX B

October 23, 2017

### SAMPLE

Kim Fawn, County Prosecutor  
Basin County/Prosecutor's Office  
123 Nowhere Road  
Holiday, New Jersey 88888

RE: State vs. Jane Doe

Complaint No. W2017-0000  
N.J.S.A. 2C:29-9

Dear Ms. Fawn:

I have been appointed by the Court to represent the interests of Jane Doe with regard to the above-captioned matter in Family Court. Demand is hereby made for any and all discoverable material available related to this matter.

Thank you for your attention and cooperation.

Very truly yours,

LAW OFFICE

JOHN DOE

JD:db

cc: Family Court Criminal Case Management

\*The included sample letter is to be used as a guide or example, and must be adjusted to suit your client's needs. The New Jersey Judiciary is providing this letter as an informational item and disclaims any and all responsibility or liability that may be asserted or claimed arising from, or claimed to have arisen from, reliance upon the use of this sample letter by any person.



Appendix C



**CSI TECHNOLOGY GROUP**

*Premier Software Solutions for eGovernment*

**InfoShare eDiscovery**  
**Portal Registration**  
**Guide**

Prepared By:  
Joshua M. Ottenberg

**CSI TECHNOLOGY GROUP**  
**330 MAC LANE, KEASBEY, N.J. 08832**  
**(732) 346-0200**

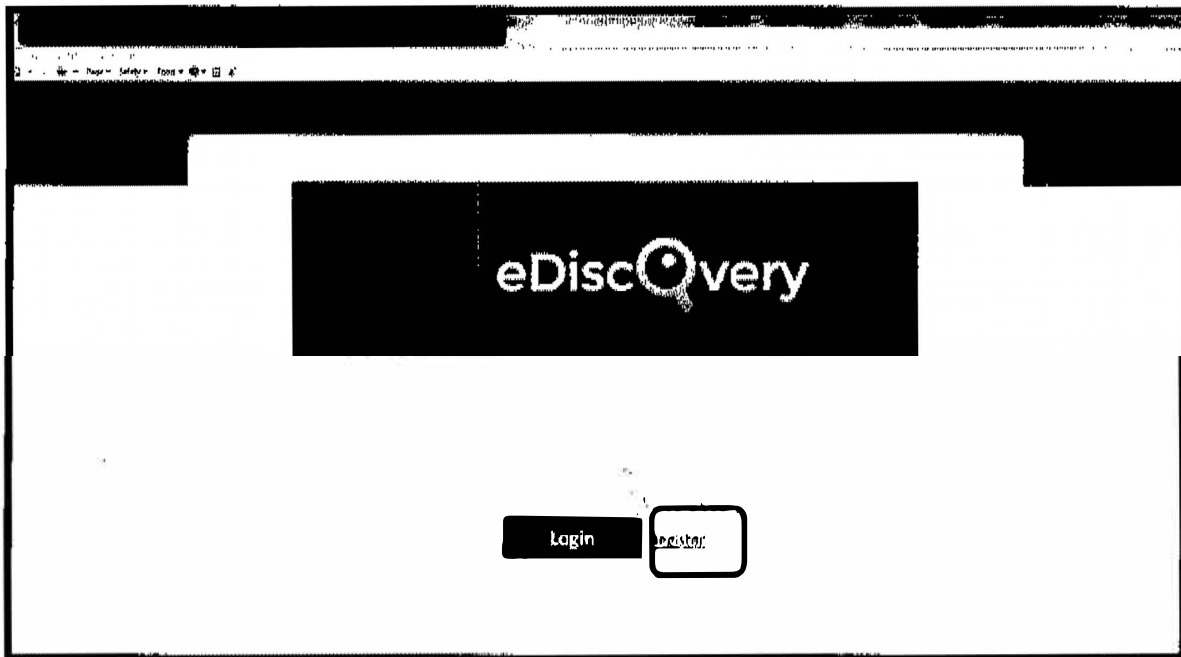
**[WWW.INFOSHARE.COM](http://WWW.INFOSHARE.COM)**

## 1. REGISTRATION:

Open a browser window on your computer and insert the URL:

<https://njdiscovery.infoshare.com>

It should take you to this internet home page:



The registration process begins by clicking the **Register** link on the homepage.

2. The registration process requires the user to agree to the below user agreement.

**(ALL USERS MUST READ AND AGREE TO THE FOLLOWING USER AGREEMENT IN ORDER TO COMPLY WITH THE REQUIREMENT OF INFORMATION SECURITY AWARENESS TRAINING BEFORE PROCEEDING FURTHER.)**

1. All authorized personnel who have access to criminal justice information (CJI) or manage CJI systems are required to receive biennial security awareness training.
  - a. The initial training shall be required prior to accessing any CJI on this site.
  - b. Documentation of security awareness training must be maintained by the agency sponsoring this site.
  - c. For further information refer to the Federal Bureau of Investigation (FBI) Criminal Justice Information System (CJIS) Security Policy Section 5.2: Policy Area 2: Security Awareness Training.
2. The FBI CJIS Security Policy provides the minimum level of security requirements determined acceptable for the transmission, processing, dissemination and storage of Criminal Justice Information (CJI).
  - a. CJI is the abstract term used to refer to all of the FBI CJIS provided data necessary for law enforcement agencies to perform their mission and enforce the laws, including, but not limited to: biometric, identity, biographic, property, and case/incident history data.
  - b. The intent of the CJIS Security Policy is to ensure the protection of the above CJI until such time as the information is either released to the public, for example, crime report data, or is purged or destroyed in accordance with applicable statutes.
3. CJI must be properly handled throughout its life cycle whether at rest or in transit. CJI may only be disseminated to authorized recipients. CJI must be marked or identified as such and viewed only by those persons authorized to do so.
  - a. CJI must be shielded from the intentional or unintentional view of non-authorized personnel.
  - b. Improper access, dissemination, handling, or use of CJI is serious and may result in administrative sanctions including, but not limited to, termination of services, civil penalties, and state or federal criminal penalties.

4. Access to and use of Criminal History Record Information (CHRI), commonly known as "Rap Sheets" is for authorized purposes only, including investigation, arrest, or criminal justice employment. It is not to be used for licensing purposes.
  - a. Dissemination is authorized if the other agency or party is an authorized recipient.
  - b. All CHRI must be afforded maximum security. It is intended for use by authorized criminal justice agencies for criminal justice purposes.
  - c. New Jersey Computerized Criminal History (NJCCH) can only be accessed for a criminal justice purpose: investigation, arrest, criminal justice employment. It is not to be used for firearms permit investigations.
  - d. Interstate Identification Index (III) can only be accessed for a criminal justice purpose: investigation, arrest, criminal justice employment, and firearms permit investigations.
  
5. Utilizing publicly accessible computers to access, process, store or transmit CJI is prohibited. Publicly accessible computers include but are not limited to: hotel business center computers, convention center computers, public library computers, public kiosk computers, etc.
  - a. For further information refer to the FBI CJS Security Policy Section 5.5: Policy Area 5: Access Control.
  
6. According to the Office of New Jersey Info Security, no personal devices are permitted to attach to any New Jersey network. This does not include access to this site for the purpose of the authorized down loading of discovery materials.
  - a. Users must be aware of the potential risk of opening E-mail attachments from unknown sources, (virus, malicious code, computer security incident).
  - b. Users must be aware of the potential risk of social engineering: The act of manipulating people to perform actions or divulging confidential information. Prior to releasing any CJI, the identity of the requestor and their right to receive the information must be verified.

I agree to abide by the above User Agreement when accessing and handling CJI through this site.

☒ I agree to the above Terms of Use policy

*Click for previous and next page navigation*

This user agreement is designed to insure that the user understands the significant of the confidentiality of some of the records posted on the site. The language closely tracks the New Jersey State Police Criminal Justice Information Systems basic user agreement for access to the NCIC client based Criminal History record System.

Users of the eDiscovery Portal must agree to the terms of the user agreement before proceeding with registration. Checking the box will cause the blue "Click to proceed with Registration" button to become active. The user should click the button.

I agree to abide by the above User Agreement when accessing and handling CJI through this site.

☒ I agree to the above Terms of Use policy

[Click to Proceed with Registration](#)

### 3. Personal/Business information.

Portal registration calls for the user to supply a couple different kinds of information. Basic personal information is added first.

#### Personal Information

\* Login Email:

\* Password

Confirm password

\* First Name

\* Last Name

Middle Name

Suffix Name



Occupation/Title

\* Law Firm Name

\* Attorney Identification  
Number

a. **We recommend you use your office email. This will be your username.**

b. Passwords should be letters and numbers only. The password re-set policy is at the discretion of the county system administrator.

c. Your firm name and Attorney ID number are required, as well as an email address and a cell phone to receive authentication codes for login.

4. Contact Information is necessary for confirmation of registration and for dual authentication<sup>1</sup>.

The screenshot shows a registration form titled "Contact Information". It contains several input fields and a button. The fields are: "Street Name", "Apt/Bldg/Suite", "City", "State" (with a dropdown arrow), "Postal Code", "Email" (with a dropdown arrow), "Office Phone", "Fax Number", and "Comments or Additional Information". There are two checkboxes: "Receive Confirmation Code By" and "Confirmation Code". The "Email" option is selected for the first checkbox. The "Request Confirmation Code" button is located to the right of the checkboxes. Below the button, there is a text instruction: "Please click the Request Confirmation Code button to receive the confirmation code." The form is enclosed in a black border.

It is recommended that initially the user chooses email as the method of receiving the confirmation code.

<sup>1</sup> Dual Authentication is an industry standard security requirement that may be initiated in the future to add an extra layer of security to the site. It is not currently in use.

5. Set up your security questions.

Security Questions











Question 1	<input type="text"/>	<input type="button" value="v"/>
Answer 1	<input type="text"/>	
Question 2	<input type="text"/>	<input type="button" value="v"/>
Answer 2	<input type="text"/>	


Users should choose the security question that it is easiest for them to remember the answer to.

6. Choose an anti-spoofing icon, and verify that you are not a robot.

Verify Your Registration

Security Image:

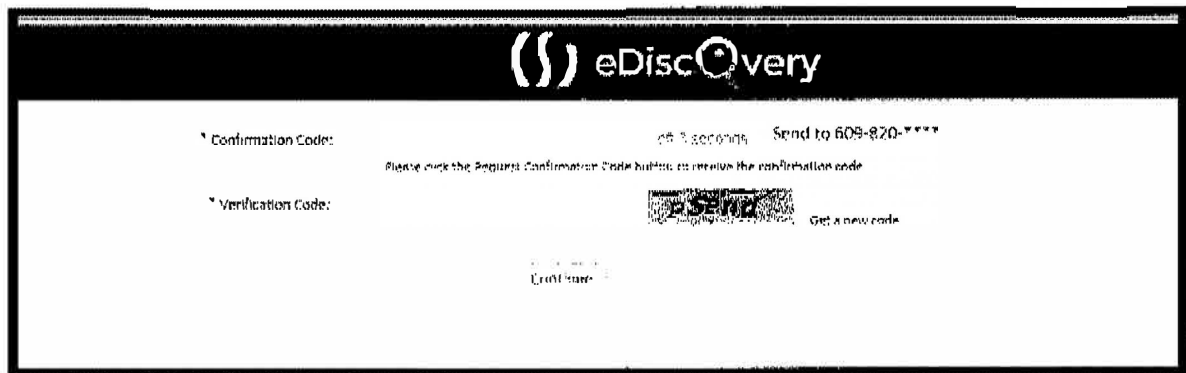
Verification Code:  [Get a new code](#)

7. To complete the process, click the green **Sign Up** button.

<input type="button" value="Sign Up"/>	<input type="button" value="Reset"/>
--	--------------------------------------

Your request for an account will be processed by the Prosecutor's Office and you will be notified via email when your account has been approved and you can log in.

7.1 If dual authentication has been activated for your user account, you will be asked to complete the dual authentication process whenever you log in.



eDiscQvery

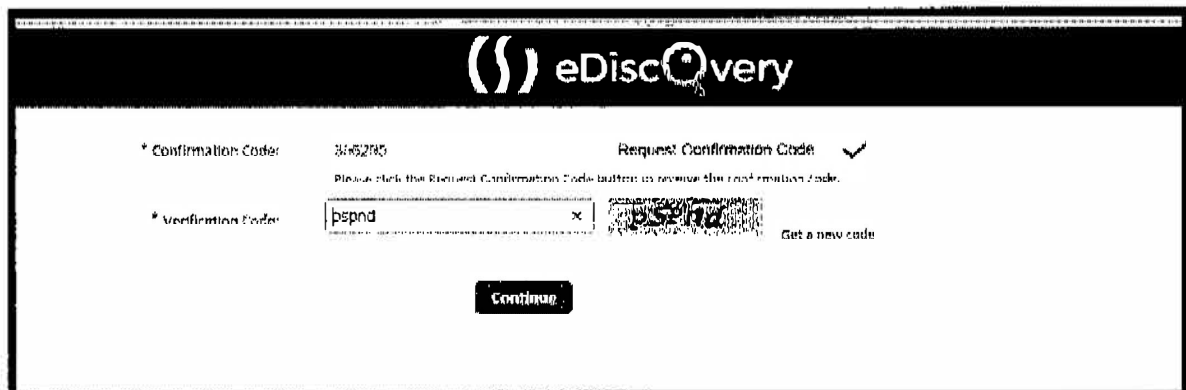
\* Confirmation Code: 00:00 seconds Send to 609-820-XXXX

Please click the Request Confirmation Code button to receive the confirmation code.

\* Verification Code: Get a new code

Continue

7.2 When you receive the code you enter it in the Confirmation Code box and then fill out the Verification Code.



eDiscQvery

\* Confirmation Code: 3452745 Request Confirmation Code ✓

Please click the Request Confirmation Code button to receive the confirmation code.

\* Verification Code: bspnd Get a new code

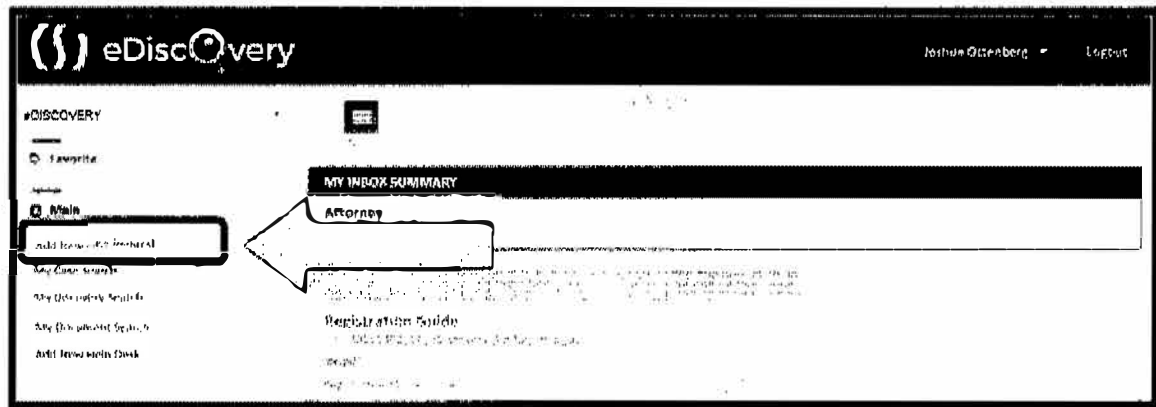
Continue

After you click Continue, you will be taken to your homepage.

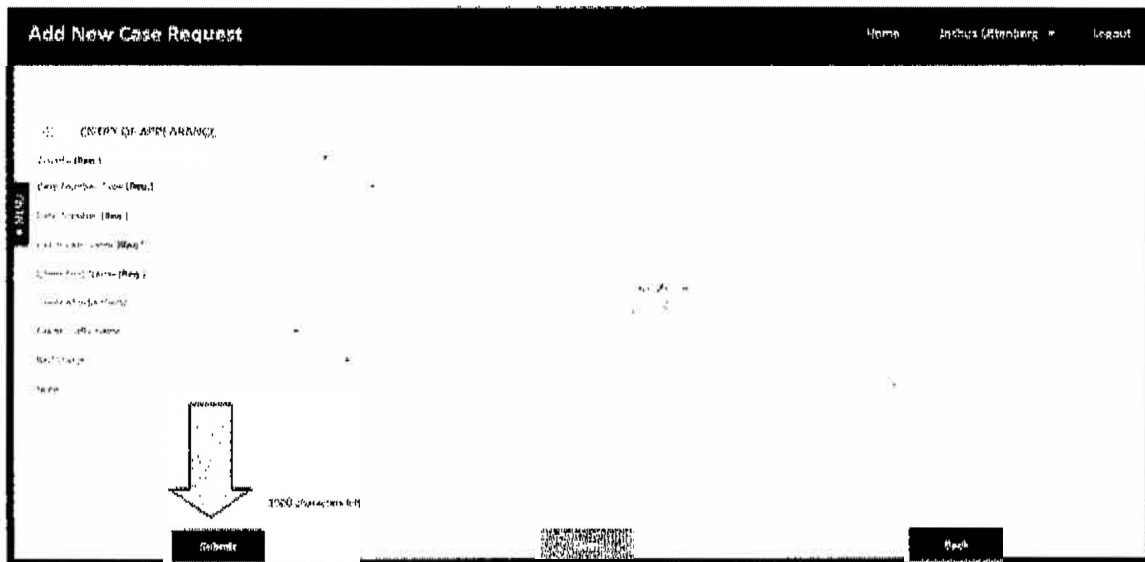


### 8. Requesting Access to a New Case.

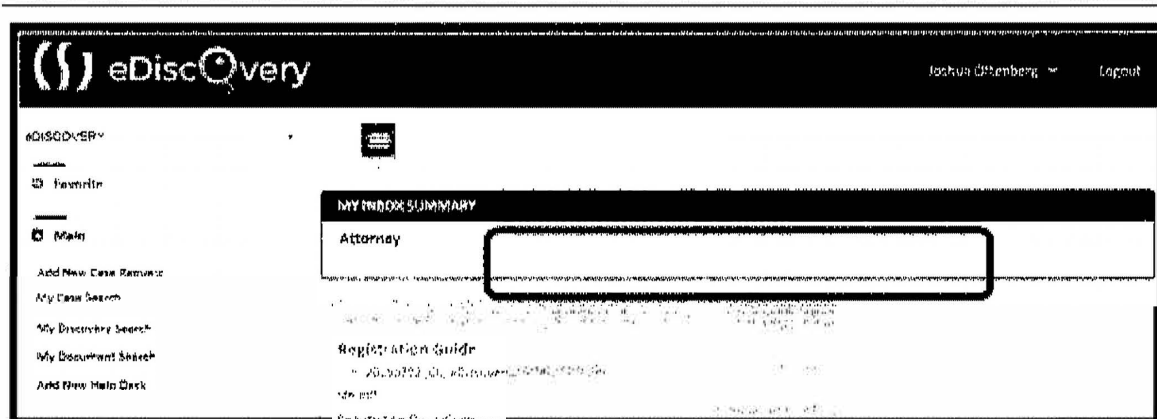
Once an attorney is a registered user of the Portal, they can request access to new cases through the portal. The user starts by signing on to the portal, and clicking on Add New Case Request from the home page.



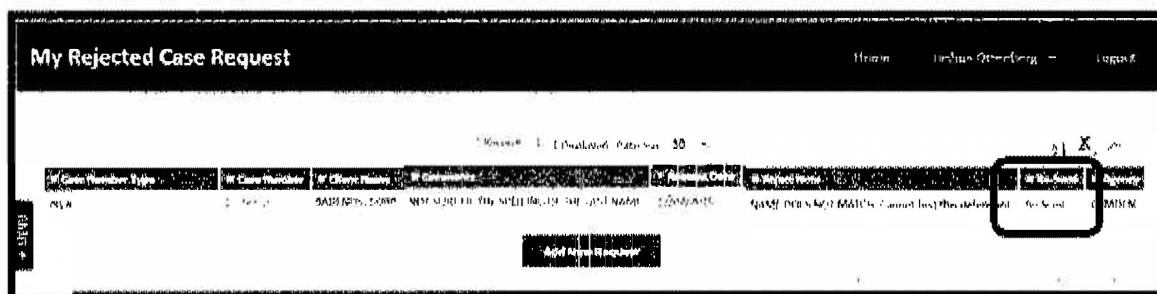
The user then adds as much accurate information as they have about the new case.



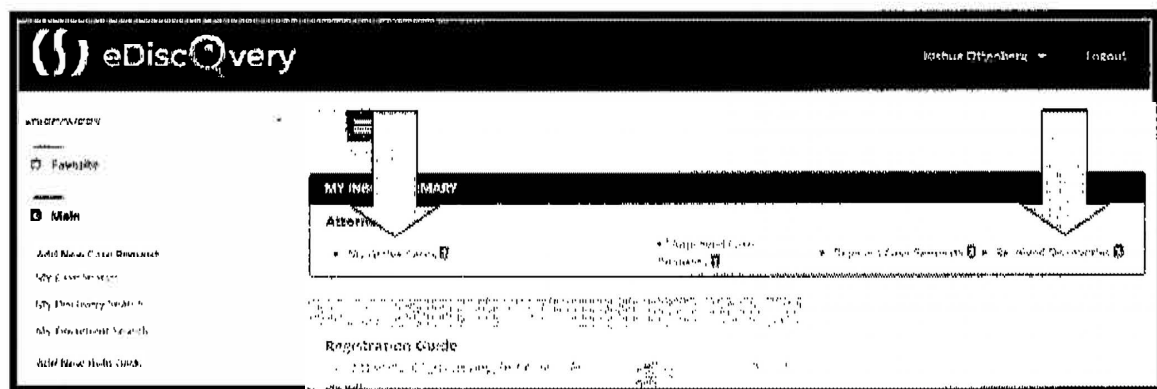
When the user clicks the Submit button, the request will be sent off to an inbox on the court side and at the Prosecutor's Office for review. A user can view the status of their request by looking in the inboxes on their homepage.



When a Request is rejected because there is not enough information to match the attorney to the case, the rejected case inbox has a “Re-Send” link that allows the user to add more detail.

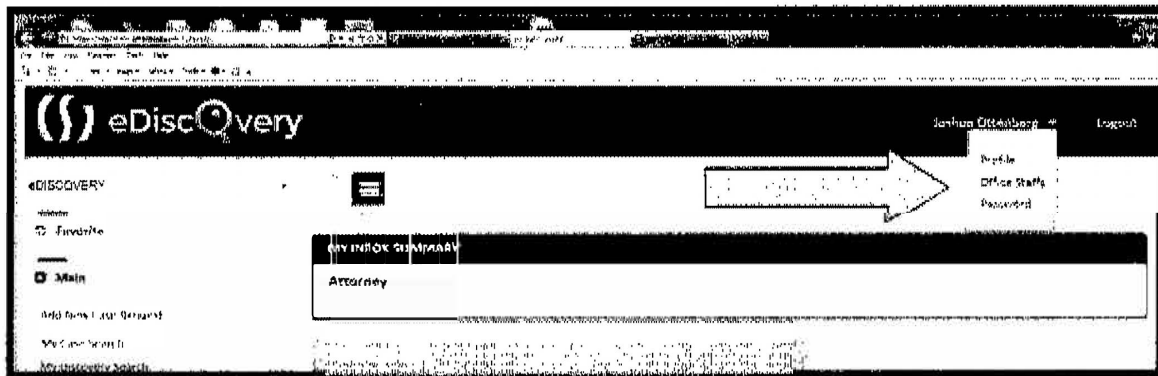


Once a Request has been accepted, the available discovery package will be added to the user's Active Case list.



## 10. REGISTERING RELATED CLERICAL SUPPORT STAFF.

Attorneys are able to register their clerical support under their own registration. This is done by clicking on their name on the home page, and then the Office Staffs link under it.



This will open a page showing the staff that has already been added and allowing the addition of new staff.



To add new staff, simply click the add button and add the relevant details.

**Add Office Staff**

**Personal Information**

Login Email (Req.)  Please input the right login email format

Password (Req.)

Confirm Password (Req.)

First Name (Req.)  Last Name (Req.)

Middle Name  Suffix

Occupation/Title

**Contact Information**

Street Name

Apt/Bldg/Suite

State  City

By creating a user name and password for a member of their support staff, a registered attorney accepts responsibility for the support staff's conduct on the site. The support staff's registration is associated with the Attorney Id number of the registered attorney.

#### **HELP DESK ASSISTANCE:**

Thank you for your attention to this matter. If you have additional questions, please contact the appropriate county representative:

#### **MERCER COUNTY:**

Ms. Kelly DiPastina, [kdipastina@mercercounty.org](mailto:kdipastina@mercercounty.org), is the primary contact at the Mercer County Prosecutor's Office. Ms. DiPastina's phone number is (609) 989-6952

Or

Mrs. Debra De La Cruz, [ddelacruz@mercercounty.org](mailto:ddelacruz@mercercounty.org), Mrs. De La Cruz's phone number is (609) 989-6307

#### **OCEAN COUNTY:**

Ms. Mandy Goodman, System Administrator, Ocean County Prosecutor's Office. Phone number is 732-929-2027, [mgoodman@co.ocean.nj.us](mailto:mgoodman@co.ocean.nj.us)

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## **APPENDIX D**

### **LINKS TO HELPFUL RESOURCES**

**Domestic Violence Procedures Manual:** *(Please note: this manual is in the process of being updated and contains out-of-date information regarding bail)*

<http://www.njcourts.gov/courts/assets/family/dvprcman.pdf>

**Vicinage Family Division Website and Contact Information**

<https://www.njcourts.gov/courts/family/familyvicinage.html>

**Vicinage Criminal Division Website and Contact Information**

<https://www.njcourts.gov/courts/criminal/criminal.html>

**New Jersey Judiciary Domestic Violence Page**

This includes N.J.S.A 2C:25-17 et seq. and the New Jersey Domestic Violence Procedures Manual.

<http://njcourts.gov/courts/family/dv.html>

**The New Jersey Pretrial Justice Manual**

Created by the American Civil Liberties Union of New Jersey and the New Jersey Office of the Public Defender - guidance on representing clients under the Criminal Justice Reform law.

[https://www.nacdl.org/NJPretrial\\_Release/](https://www.nacdl.org/NJPretrial_Release/)

**Instructions on Filing in the Judiciary's Appellate Division** (if you are given a case at the appellate level)

This includes explanation, links, and forms for mandatory eFiling, as well as discussion of the standard of review.

<http://www.njcourts.gov/courts/appellate.html?lang=eng>

## APPENDIX E

### Overview of Routes through the Pretrial Justice System for a Defendant Charged with a Disorderly Persons Domestic Violence Offense

This section provides information on the criminal justice processes your client may have been subject to pretrial - after a complaint has been issued against him/her for the domestic violence contempt charge.

The Criminal Justice Reform Act (CJRA) N.J.S.A. 2A:162-15 et seq., went into effect on January 1, 2017 and profoundly changed the criminal justice system relating to pretrial release. In the past, the system was heavily reliant upon monetary bail. CJRA provides judges the authority to release defendants on their own recognizance or with certain non-monetary conditions, such as GPS monitoring and reporting to Pretrial Services. While monetary bail is disfavored, it can still be ordered. N.J.S.A. 2A:162-15. Judges also, in certain circumstances, have the “authority to detain defendants prior to trial if they present a serious risk of danger, flight, or obstruction.” State v. Robinson, 229 N.J. 44, 55 (2017).

#### A. Overview of the Path through the Criminal Justice System

When a defendant is arrested on a domestic violence contempt charge(s), the defendant will either be issued a complaint-summons or a complaint-warrant. R. 3:3-1. This decision will be made at the time of the arrest, before you have been appointed. This information is provided as an overview so that you understand how your client moves through the justice system.

If the defendant is issued a complaint-summons, the defendant will be released on his or her own recognizance. Ibid. If the defendant is issued a complaint-warrant, the defendant will be transported to the county jail and temporarily detained for the Pretrial Services Unit (a part of the Judiciary) to prepare a risk assessment with recommendations on conditions of release. R. 3:26-1.

#### B. Centralized First Appearance Court – Conditions of Pretrial Release

For defendants charged on a disorderly persons offense on a warrant, the defendant must appear at a Centralized Judicial Processing (CJP)/Centralized First Appearance court event where the judge will make a decision on pretrial release conditions for the defendant. R. 3:26-1. This CJP first appearance must occur no later than 48 hours after the defendant’s commitment to county jail. Ibid.

The State Office of the Public Defender has agreed to represent indigent defendants at CJP pretrial release hearings. As such, *pro bono* attorneys are not involved at this stage of the case. The court must consider the Pretrial Services Program’s risk assessment and recommendations on conditions of release before making any pretrial release decision. R. 3:26-1(a). The Public Safety Assessment (PSA) is an automatic tool that considers three pretrial risk indicators: a six-point failure to appear (FTA) scale, a six-point new criminal activity (NCA) scale and a new violent criminal activity (NCVA) flag.

Once a risk assessment has been conducted, the statute requires a court to consider the assessment “and any information that may be provided by a prosecutor or the . . . defendant” in reaching its decision regarding whether the defendant should be detained or released and, if released, on what conditions. N.J.S.A. 2A:162-16. The statute provides a hierarchy for making such decisions,

favoring release on the least restrictive conditions that “in the judgment of the court, will reasonably assure their presence in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.” Many defendants are released on their own recognizance or on a combination of non-monetary conditions. R. 3:26-1(a). The court may detain a defendant without bail, upon a motion of the prosecutor and after a hearing.

If you have any questions about interpreting the Public Safety Assessment, please contact the Criminal Division Managers’ Office and request to speak to the Pretrial Services Unit, Assistant Division Manager. Contact information is found in Appendix D, ‘Links to Helpful Resources.’

### **C. Pretrial Detention**

At the motion of the prosecutor, the court may hold a hearing to determine whether the defendant should be detained while awaiting the disposition of his or her case. R. 3:4A. This hearing will be held in Superior Court, Criminal Part. The State Public Defender has agreed to represent these defendants at the detention hearings when they occur shortly after the CJP pretrial release hearing. Therefore, *pro bono* attorneys are not involved at this stage in the case. The information in this section is provided so that you will have an overview of what has occurred regarding your client’s path through the criminal justice system.

At a detention hearing, the court shall determine whether any amount of monetary bail or non-monetary conditions or combination of monetary bail and conditions, including those set forth in N.J.S.A. 2A:162-17(b), “will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.” N.J.S.A. 2A:162-19(c). See R. 3:4A. The Rules of Evidence do not apply, so hearsay is permitted. N.J.S.A. 2A:162-19(e). The State is not compelled to call a live witness at the detention hearing to establish probable cause. State v. Ingram, 230 N.J. 190 (2017).

Rule 3:4(b)(5) states that the State must rebut the presumption of pretrial release by clear and convincing evidence. The State must first establish probable cause that the defendant committed the offense. Probable cause consists of a “well grounded” suspicion that an offense has been committed. There is a rebuttable presumption against detention. N.J.S.A. 2A:162-8(b). “[T]he State must rebut the presumption that some amount of monetary bail, non-monetary conditions, or a combination thereof would reasonably assure (1) the defendant's appearance in court when required, (2) the protection of the safety of any other person or the community, and (3) that the defendant will not obstruct or attempt to obstruct the criminal justice process. State v. C.W., 449 N.J. Super. 231, 249 (App. Div. 2017). The information to be considered by the court at a detention hearing is delineated in N.J.S.A. 2A:162-20. See State v. C.W., *supra*.

If the judge determines that the defendant should be detained, he/she will be returned to county jail.<sup>7</sup>

<sup>7</sup> If the defendant is detained, he or she may not be incarcerated for more than six months on the disorderly persons offense of contempt. R. 7:8-11. The defendant must be released, but may be released with conditions.



The defendant may appeal the detention order; however, the State Office of the Public Defender has indicated that it will **not** represent an indigent defendant whose highest charge is a disorderly persons offense on an appeal to the Appellate Division. Therefore, the *pro bono* attorney will be required to step into the case for an appeal of a detention order (if appointment has not already occurred).

#### **D. Appeal of Pretrial Detention Order**

Under R. 2:9-13, a defendant who is ordered detained pretrial has **seven (7) days** from the entry of the court order to file a notice of appeal. If the notice of appeal is not filed within that timeframe, the defendant may file a motion to request permission to file the notice of appeal beyond the seven days provided by R. 2:9-13(b). The motion must be supported by a certification explaining the delay in filing and why leave to file as within time should be granted.<sup>8</sup> The filing of an appeal of a Detention Order does not stay the case, *i.e.*, the case continues in the appropriate division, unless so ordered by the Appellate Division. R. 2:9-13(f).

As a result, if your *pro bono* case involves a defendant who has been ordered detained – the first obligation you will likely have is to immediately contact your client and ascertain whether he/she seeks to appeal the detention order. Time is of the essence because of the short deadline for submission of a notice to appeal. R. 2:9-13. The Appellate Division requires that appeals be filed electronically. Detailed instructions on eFiling and the filing of appeals from detention motions are found on the Judiciary’s public website on the Appellate Court webpage:

<http://www.njcourts.gov/courts/appellate.html?lang=eng>

Link to Appellate forms:

<http://www.judiciary.state.nj.us/selfhelp/catalog.html?keywords=Appellate%20set&customer=Attorneys>

#### **E. Possible Changes in Conditions of Release**

If your client has been released on conditions, those conditions may be subject to change. Part III of the Rules of Court provides guidance on review of conditions in the criminal arena.

Rule 3:26-2(c) provides that the court may review the conditions of pretrial release set pursuant to R. 3:26-1 on its own motion, or upon motion by the prosecutor or the defendant alleging that there has been a material change in circumstance that justifies a change in conditions. Any review of conditions pursuant to this rule shall be decided within 30 days of the filing of the motion. Upon a finding that there has been a material change in circumstance, the judge may set new conditions of release but may not order the defendant detained except as provided in R. 3:4A.

<sup>8</sup> Attorneys assigned pursuant to Madden v. Delran to represent defendants on appeal who are detained pretrial on disorderly persons offenses involving domestic violence matters have seven (7) days from the entry of the pretrial detention order to file an appeal. The Appellate Division has provided that in the event that deadline is missed, assigned attorneys for these defendants are advised that in the absence of objections, motions to file a notice of appeal as within time, filed within 21 days of entry of the pretrial detention order and simultaneously with the notice of appeal, will be granted.

Some examples of scenarios which may give rise to a motion for change in conditions of release might include (on defendant's side) a new job with a new schedule that may impact existing electronic monitoring restrictions, or (on the State's side) information that the defendant has not reported to Pretrial Services as required or has contacted a person whom he/she was prohibited from contacting.

When the prosecutor makes a motion for revocation of release, it will most often be heard at a 'violation of monitoring' hearing. At such a hearing, the defendant has the right to be represented by counsel, to be provided with all available discovery, afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise. R. 3:26-2(d).

You will be responsible for representing the defendant at the violation of monitoring hearing or any reconsideration of conditions of release hearing. R. 3:26-2(d).

At a violation of monitoring hearing the court, upon a finding, by a preponderance of the evidence, that the defendant while on release violated a restraining order or condition of release, or upon a finding of probable cause to believe that the defendant has committed a new crime while on release, may revoke the defendant's release and order that the defendant be detained pending trial. Ibid. In making such a determination, the court considers all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed. Ibid. In order to revoke defendant's release, the court must find by clear and convincing evidence that no monetary bail, non-monetary conditions of release or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process. Ibid.; N.J.S.A. 2A:162-24.

The defendant may appeal either an initial order of detention or a later revocation of release – these appeals are heard in the Appellate Division. R. 2:9-13. The *pro bono* Madden attorney is responsible for representing the defendant in any appeal of a pretrial order of detention.

# Overview of Routes through the Pretrial Justice System for a Defendant Charged with a Disorderly Persons Domestic Violence Offense

*Note: shaded boxes–court events at which pro bono Madden attorneys required to be involved)*

Defendant allegedly engaged in conduct which constitutes a violation of a restraining order, giving rise to a charge of violating N.J.S.A. 2B:29-9(b).

Police officer requests and is granted **warrant** for defendant's arrest. After arrest, defendant follows any one (or more) of pretrial paths set forth below. Underlying case still progresses. Case ends with hearing on original charge (see box at bottom of page).

Police officer issues **summons** for defendant – defendant instructed to come to court to answer charges on certain date. See Appendix A for flow chart on progression of DV Family Court case.

Defendant arrested and taken to county jail where risk assessment run to inform conditions of release

Central Judicial Processing (CJP) / Centralized First Appearance (CFA) court event held within 48 hrs of arrest– judge determines conditions of release (e.g., stay away from alleged victim, house arrest)

**You will get case - meet with your client**

At (or before) CJP, prosecutor may make a motion for pretrial detention of defendant – this motion heard in Superior Court Criminal.

Defendant released & complies with conditions. Next step - handling of original charge -violation of restraining order- in **Superior Court Family Part** (see box at bottom)

Defendant released and fails to comply with conditions (e.g., commits new offense, contacts victim when told not to).

Defendant may want conditions changed (e.g., modify electronic monitoring). Makes motion before **Family Part Judge** **You must represent defendant**

Detention hearing in Superior Court Criminal Division. State Public Defender will represent defendant.

'Violation of Monitoring' hearing may be held in Superior Court **Family Part**. It can occur at same time as hearing on underlying contempt charge – but not always. **(You must represent defendant)**

**Be aware:** while issues of pretrial conditions and detention are addressed – the case on the original charge continues to progress

Defendant ordered detained. Can appeal. You must represent defendant on appeal.

Defendant not ordered detained. Must be released; potentially on stricter conditions.

At violation of monitoring hearing - defendant may be released- potentially on stricter conditions.

At violation of monitoring hearing, prosecutor may make motion for revocation of pretrial release.

Revocation of release hearing - Superior Court (prosecutor wants defendant detained). **(You must represent defendant)**

Motion denied – defendant released, potentially on stricter conditions.

Motion granted– defendant detained pretrial. Defendant can appeal – Appellate Div.

**Be aware:** conclusion of underlying case makes pretrial issues of release/detention, etc. moot

**Be aware:** you are not responsible for the appeal of case – but must file notice of appeal if requested and file application to be relieved as counsel

Defendant's appeal of detention order to Appellate Div. – **(You must represent defendant)**

**Hearing in Superior Court Family Division for ORIGINAL CHARGE - violation of restraining order - N.J.S.A. 2C:29-9(b). (You must represent defendant)**

See Appendix A for flow chart on progression of DV Family Court case.

## APPENDIX F

### Frequently Asked Questions

**1. My client is incarcerated. How do I arrange to meet with him or her at the jail or prison and who is responsible for making sure my client is brought to court?**

New Jersey has three (3) types of facilities: Federal prisons, state prisons and county jails. You will need to call the facility and ask for the Warden's Office. For county jails, the Sheriff's Department may also be of help in arranging visits or calls. There will be someone assigned in the administration to assist in communication with prisoners. Depending on the type of facility, you may be able to arrange to have phone or video-conferences with your client. Make sure you are on time for scheduled calls, as the facilities cannot accommodate late starts or time overruns.

The facility will give you an address at which to send documents to your client. You will want to ask for your client's identification number and use that on all written communication. Be prepared for delays as mail goes through inspection and may be delayed in getting to the inmate.

For court appearances, provide the facility information to your judge's staff. They will be able to arrange for your client to appear by video-conference for most appearances. You may find other helpful information at:

[www.state.nj.us/corrections](http://www.state.nj.us/corrections)

<http://www.state.nj.us/corrections/pages/InmateTelephoneSystemInfo.html>

<http://www.njcjwa.org/jails.html>

**2. My client does not speak English. How do I arrange for an interpreter at conferences (either at my office, on the phone or at the county jail) with my client and who pays for it?**

The Judiciary's language access policy is set forth in Directive #01-17, which can be found on the Judiciary's website at the following link:

[https://www.judiciary.state.nj.us/attorneys/assets/directives/dir\\_01\\_17.pdf](https://www.judiciary.state.nj.us/attorneys/assets/directives/dir_01_17.pdf). The plan sets forth the following:

**Standard 1.4.3:**

R. 1:13-2(b) provides in pertinent part that "no attorney [assigned to represent a person by reason of poverty] shall be required to expend any personal funds in the prosecution of the cause." Accordingly, pro bono attorney requiring interpreter services must use the Registry to select and hire an approved interpreter. The pro bono attorney or interpreting service shall submit a standard payment voucher to the vicinage Trial Court Administrator for payment of the fees for the interpreting services. Staff interpreters are not permitted to provide interpreting services during case preparation, and as such may not be assigned to assist the pro bono attorney prior to any court related event. Except for the use of interpreters, at the court's discretion, to interpret brief attorney-client communications immediately before, during or after court proceedings, as forth in 1.2.1 above, interpreters who provide interpreting services during case preparation, should not, wherever practicable, interpret in court-related proceedings involving the case.

**3. My client appears unstable or incompetent. How do I arrange to have him or her assessed? Who pays for the assessment?**

Pursuant to N.J.S.A. 2C:4-4, no person who lacks capacity to understand the proceedings against him/her or who cannot assist in their own defense shall be tried, convicted or sentenced for the commission of an offense as long as the incapacity is present. If there is reason to doubt the defendant's ability to proceed, the prosecutor, defense counsel or the court on its own motion, may seek to appoint a qualified psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant. N.J.S.A. 2C:4-5. The findings of this evaluation may determine the disposition of the charges. See N.J.S.A. 2C:4-6.

**4. My client wants the parties' minor child to testify. Are there special procedures I need to follow?**

The general rule is that every person is qualified to testify, as long as they are competent to do so. State v. R.W., 104 N.J. 14, 19 (1986); State v. Walker, 325 N.J. Super 35, 40 (App. Div. 1999). These tests do not change when assessing a juvenile. State v. R.W., supra, 104 N.J. at 20. As always, whether to permit a particular person to testify is within the discretion of the trial court.

**5. My client claims that he did not know about the underlying restraining order. What is the process for filing motions in a contempt case?**

As with all motions, the motion must be in writing and must comply with R. 5:5-4(d), Motions in Family Actions.

**6. I never handled a domestic violence case, or for that matter, any family-related matter. I exclusively practice real estate law. Can I be excused from the assignment? If I can't be excused, can I at least arrange for a colleague, my law associate or partner to represent the defendant on my behalf?**

Lack of familiarity with the subject matter is generally not a reason to be relieved of a *pro bono* assignment. Any request to be excused from the assignment should be presented to the Assignment Judge. You are permitted to reach out for assistance in the completion of the assignment to other attorneys – you will still get credit for completion of the assignment. However, you remain responsible for the representation of your client. Please review the *pro bono* information page on the Judiciary's public website for information about *pro bono* assignments, found here: <http://www.njcourts.gov/attorneys/probono.html>

**7. My client alleges the complaint is frivolous. The victim initiated the contact. Can my client file a cross-complaint or seek recovery against the victim?**

A victim, or plaintiff, in a restraining order is not prohibited from anything pursuant to that restraining order. Therefore, a victim can never violate a restraining order. Restraining orders only ever enjoin defendants.

**8. I was appointed to represent the defendant on a contempt charge but the prosecutor also charged the defendant with a criminal offense in connection with the contempt. Do I have to handle that charge as well?**

If the defendant is being prosecuted in municipal court for a related disorderly persons offense, such as simple assault, the *pro bono* attorney is not responsible for representing the defendant in that matter. The municipal public defender will represent the indigent defendant in municipal court.

### **9. What is Criminal Justice Reform and does it apply to my client?**

Please see the Appendix E of this manual discussing the role of Criminal Justice Reform and your client's case.

### **10. My client and I disagree on whether they should accept the plea offered by the prosecutor. Since there is a breakdown of communication, can I be relieved of my assignment?**

A difference in strategy would not necessarily constitute a reason to be relieved from an assignment. Counsel should explain various litigation options to the client, and to guide him or her appropriately. In extreme instances, a difference in strategy may be a reason to be relieved from an assignment. Counsel that wishes to pursue such a withdrawal must adhere to the requirements put forth in R. 1:11-2, Withdrawal or Substitution, as guided by R.P.C. 1:16, Declining or Terminating Representation.

### **11. My client wants to appeal the judge's decision. Am I responsible for filing the appeal and/or representing the defendant on appeal and, if so, where can I obtain information on how to file an appeal?**

Rule 2:7-2(d) governs the extent of the *pro bono* attorney's obligation on appeal. That rule provides:

Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise his or her right to appeal. An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal.

Should you chose to continue with representation on appeal – or, if you are initially assigned an appeal by the *pro bono* coordinator – information on the mandatory electronic filing in the Appellate Division (including step-by-step instructions and videos) can be found on the Appellate Division homepage, located here:

<http://www.njcourts.gov/courts/appellate.html?lang=eng>

### **12. How do I handle expenditures or expenses on behalf of my client (e.g., cost for experts, transcripts, etc.)?**

Rule 1:13-2(b) provides in relevant part that “no attorney assigned to represent a person by reason of poverty... shall be required to expend any personal funds in the prosecution of the cause.” Several cases have discussed the payment of litigation related expenses where the litigant is indigent. See In the Matter of Cannady, 126 N.J. 486 (1991) (regarding payment for ancillary defense costs in criminal matters). Rule 2:5-3(d) provides in relevant part that “if the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for

use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense.”

**13. Why is my client wearing an electronic ankle bracelet and what does it mean?**

A judge released your client from jail and imposed a condition of release, home detention with an electronic ankle bracelet. In addition, there is a zone around the victim and your client is not permitted to enter it.