

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

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OFFICE WEST VIRGINIA
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Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: Governor's Committee on Crime, Delinquency and Correction TITLE NUMBER: 149

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 3

TITLE OF RULE BEING AMENDED: Protocol for Law Enforcement Response to Domestic
Violence

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

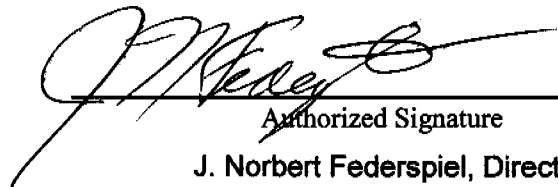
TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) House Bill 2669

SECTION §64-9-7(b), PASSED ON April 9, 2005

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: July 1, 2005


Authorized Signature
J. Norbert Federspiel, Director

\$6.00

**TITLE 149
LEGISLATIVE RULE
GOVERNOR'S COMMITTEE ON CRIME, DELINQUENCY AND CORRECTION**

**SERIES 3
PROTOCOL FOR LAW ENFORCEMENT RESPONSE
TO DOMESTIC VIOLENCE**

§149-3-1. General.

1.1. Scope. -- This legislative rule establishes law enforcement response to domestic violence.

1.2. Authority. -- W. Va. Code §48-27-1102

1.3. Filing Date. -- May 11, 2005

1.4. Effective Date. -- July 1, 2005

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§149-3-2. Purposes.

2.1. The principal purpose of this rule is to establish guidelines and procedures in compliance with state and federal law to be followed by law enforcement officers and other personnel involved in police response to domestic calls.

2.2. Other purposes and goals of this rule are:

2.2.1. To reduce the incidence and severity of domestic violence by establishing arrest and prosecution, rather than mediation, as the preferred means of police response to domestic violence;

2.2.2. To afford maximum protection and support to victims of domestic violence through a coordinated program of law enforcement and victim assistance;

2.2.3. To ensure that law enforcement services are as available in domestic violence cases as they are in other criminal cases;

2.2.4. To promote law enforcement officer safety by ensuring that law enforcement officers are as fully prepared as possible to respond to domestic calls; and,

2.2.5. To help reduce police resources consumed in responding to domestic violence by reducing the number of police interventions required for any particular household.

§149-3-3. Definitions.

3.1. For the purposes of this rule, unless specifically stated otherwise, the terms "officer," "law enforcement officer," or "police officer" refer to law enforcement officers and officials as defined in this subdivision. Nothing in this rule should be construed to extend the authority of any law enforcement officer beyond the law enforcement officer's statutory jurisdiction.

3.1.1. "County" means any one of the fifty-five major political subdivisions of the state.

3.1.2. "Law enforcement agency" means any duly authorized state, county, or municipal organization employing one or more persons whose responsibility is the enforcement of laws of the state or any county or municipality of this state.

3.1.3. "Law enforcement officer" means any duly authorized member of a law-enforcement agency who is authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality of this state, other than parking ordinances, and includes those persons employed as security officers at state institutions of higher education and those persons employed as rangers by the Hatfield-McCoy Regional Recreation Authority.

3.1.4. "Law enforcement official" means the duly appointed chief administrator of a designated law-enforcement agency or a duly authorized designee.

3.1.5. "Municipality" means any incorporated village, town or city whose boundaries lie within the geographic boundaries of the state.

3.2. As used in this rule unless the context clearly requires otherwise:

3.2.1. "Credible corroborative evidence" means evidence that is worthy of belief and corresponds with the allegations of one or more elements of the offense and may include, but is not limited to, the condition of the victim, the accused, and the scene.

3.2.1.a. Credible evidence of the victim's condition may include, but is not limited to, one or more contusions, scratches, cuts, abrasions, swellings, or other signs of physical injury; missing hair; torn clothing or clothing in disarray consistent with a struggle; observable difficulty in breathing or breathlessness consistent with the effects of choking or a body blow; observable difficulty in movement consistent with the effects of a body blow or other unlawful physical contact.

3.2.1.b. Credible evidence of the condition of the accused may include, but is not limited to, physical injury or other conditions similar to those set out for the condition of the victim which are consistent with the alleged offense or alleged acts of self defense by the victim.

3.2.1.c. Credible evidence of the condition of the scene may include, but is not

limited to, damaged premises or furnishings or disarray or misplaced objects consistent with the effects of a struggle.

3.2.1.d. Other credible evidence may include, but is not limited to, statements by the accused admitting one or more elements of the offense; threats made by the accused in the presence of a law enforcement officer; audible evidence of a disturbance heard by the dispatcher or other agent receiving the request for police assistance; or written statements by witnesses.

3.2.2. "Deadly weapon" means an instrument that is designed to be used to produce serious bodily injury or death, or is readily adaptable to that use. The term "deadly weapon" includes, but is not limited to, a blackjack, a gravity knife, a knife, a switchblade knife, a nunchuka, metallic or false knuckles, a pistol, or a revolver, as defined in W. Va. Code §61-7-2.

3.2.3. "Domestic assault" means the unlawful attempt to commit a violent injury of another family or household member or unlawfully committing an act which places another family or household member in reasonable apprehension of immediately receiving a violent injury.

3.2.4. "Domestic battery" means the unlawful and intentional physical contact of an insulting or provoking nature with another family or household member or unlawfully and intentionally causing physical harm to another family or household member.

3.2.5. "Family or household members" means persons who:

3.2.5.a. Are or were married to each other;

3.2.5.b. Are or were living together as spouses;

3.2.5.c. Are or were sexual or intimate partners;

3.2.5.d. Are or were dating: *Provided*, That a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship;

3.2.5.e. Are or were residing together in the same household;

3.2.5.f. Have a child in common regardless of whether they have ever married or lived together;

3.2.5.g. Have the following relationships to another person:

3.2.5.g.1. Parent;

3.2.5.g.2. Stepparent;

- 3.2.5.g.3. Brother or sister;
- 3.2.5.g.4. Half-brother or half-sister;
- 3.2.5.g.5. Stepbrother or stepsister;
- 3.2.5.g.6. Father-in-law or mother-in-law;
- 3.2.5.g.7. Stepfather-in-law or stepmother-in-law;
- 3.2.5.g.8. Child or stepchild;
- 3.2.5.g.9. Daughter-in-law or son-in-law;
- 3.2.5.g.10. Stepdaughter-in-law or stepson-in-law;
- 3.2.5.g.11. Grandparent;
- 3.2.5.g.12. Step grandparent;
- 3.2.5.g.13. Aunt, aunt-in-law or step aunt;
- 3.2.5.g.14. Uncle, uncle-in-law or step uncle;
- 3.2.5.g.15. Niece or nephew;
- 3.2.5.g.16. First or second cousin; or,

3.2.5.h. Have the relationships set forth in 3.2.5.g.1. through 3.2.5.g.16., of this subsection, to a family or household member, as defined in subsections 3.2.5.a. through 3.2.5.f. of this section.

3.2.6. "Family violence," "domestic violence," or "abuse" means the occurrence of one or more of the following acts between family or household members:

3.2.6.a. Attempting to cause or intentionally, knowingly, or recklessly causing physical harm to another person with or without dangerous or deadly weapons;

3.2.6.b. Placing another person in reasonable apprehension of physical harm;

3.2.6.c. Creating fear of physical harm by harassment, psychological abuse, or threatening acts;

3.2.6.d. Committing either sexual assault or sexual abuse as those terms are defined in W. Va. Code §§61-8B-1 et. seq. and 61-8D-1 et seq.; or,

3.2.6.e. Holding, confining, detaining, or abducting another person against that person's will.

3.2.7. "Firearm" means any weapon that will expel a projectile by action of an explosion.

§149-3-4. Protective Orders.

4.1. A protective order is an injunction or other order, issued under domestic violence, family violence, antistalking, or similar domestic relations laws. A protective order is issued to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to a protected individual. A protective order must be issued by a court, agency or other entity authorized by law to issue or modify a protective order.

4.1.1. Protective orders include, but are not limited to, Emergency Protective Orders, Temporary Emergency Protective Orders, Domestic Violence Protective Orders, Temporary or Final Protective Orders issued as a part of Temporary or Final Divorce Orders, or any other terms or orders that have a similar purpose.

4.1.2. Domestic violence protective orders are considered criminal in nature. Law enforcement officers who are sworn law enforcement officers in the state of West Virginia are responsible for the initial service of all protective orders in order to ensure the most prompt service of the protective order. Service may be performed on any day including Sundays and holidays. No law enforcement officer shall refuse to serve pleadings or orders in domestic violence protective order actions.

4.2. A protective order generally remains in effect for the period of time stated in the order.

4.2.1. A protective order remains in effect longer than the period of time stated in the order if:

4.2.1.a. The protected person has filed for and received an extension of the protective order;

4.2.1.b. The protective order was automatically extended by the filing or reopening of a court case between the same parties after the protective order was entered; or,

4.2.1.c. The protective order was extended by an order entered in another court case between the same parties.

4.2.2. A protective order does not remain in effect for the period of time stated in the order if:

4.2.2.a. An order was entered by the court dismissing the protective order; or,

4.2.2.b. In a case between the same parties which extended the protective order as a matter of law, a temporary or final order was entered, and the temporary or final order did not extend the protective order.

4.3. A protective order issued in any county in West Virginia is in effect in all counties in West Virginia.

4.4. A protection order issued by 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, or an Indian tribe or band that has jurisdiction to issue protection orders shall be accorded full faith and credit and enforced as if it were an order of this state, whether or not the relief ordered is available in this state, if there is probable cause to believe that it is a valid foreign protection order.

4.4.1. There is probable cause to believe that a protection order is valid if it identifies both the protected individual and the respondent, and the order appears, on its face, to be authentic and currently in effect.

4.4.1.a. In circumstances whereby a written protection order is not presented, law enforcement officers may consider other credible information in determining whether there is probable cause to believe that the order exists and is currently in effect.

4.4.2. Presentation of a certified copy of a protection order is not required for enforcement.

4.4.3. For the purposes of this section, the protection order may be inscribed on any tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form.

4.4.4. A protection order, temporary or final, from another jurisdiction may be enforced even if the order is not registered, filed or entered into the state law enforcement information system.

4.5. If a law-enforcement officer determines that an otherwise valid protective order cannot be enforced because the respondent has not been notified of or served with the order, the officer shall inform the respondent of the order. The officer shall make a reasonable effort to serve the order upon the respondent. The officer shall allow the respondent a reasonable opportunity to comply with the order. The officer shall then enforce the order.

§149-3-5. Dispatcher Responsibilities.

5.1. Dispatchers under the supervision of a police department and communications

and emergency operations centers which dispatch law enforcement officers, shall dispatch domestic calls in the same manner as any other call for police assistance, in accordance with the priority criteria prescribed by generally applicable department procedures. Whenever possible, the dispatcher should assign a back-up unit.

5.2. The dispatcher receiving a domestic call should attempt to elicit from the caller, and should communicate to the responding law enforcement officers, as much of the following information, in the following order of importance, as time and exigencies of the reported incident allow:

5.2.1. The nature of the incident;

5.2.2. The address of the incident, including the apartment number or the name of the business, as appropriate;

5.2.3. A telephone number where the caller can be called back;

5.2.4. Whether weapons are involved;

5.2.5. Whether or not there are any injuries and whether or not an ambulance is needed;

5.2.6. A description of the accused and whether or not the accused is present and, if not, the most likely location, direction of flight, and mode of travel of the accused;

5.2.7. Whether children are at the scene;

5.2.8. Whether any party is using or is under the influence of alcohol or drugs;

5.2.9. Whether a protective order is in effect;

5.2.10. Whether an affidavit to enter the premises exists;

5.2.11. If the caller is the victim and in the house, would they consent to entry and how the caller may indicate the premises;

5.2.12. Whether a criminal warrant is outstanding on the accused; and,

5.2.13. Whether the accused has been released on bail on a charge of a crime against a family or household member, including a family or household member who is a child, with any conditions on bail regarding contact with the victim or complainant.

5.3. If the caller is the victim, or if the caller is a witness to a domestic incident in progress, the dispatcher should keep the caller on the telephone and should relay ongoing information provided by the caller to the responding law enforcement officers. The dispatcher should tell the caller that help is on the way and when the caller can expect the

police to arrive.

5.4. If the dispatcher has ready access to police department records that indicate whether the parties involved in the incident have been involved previously in domestic incidents or that indicate whether there is a protective order involving the parties in effect, the dispatcher should consult the records and radio any relevant information to the responding law enforcement officers.

5.5. If the dispatcher has reason to believe that the subject is on bail for a crime against a family or household member, including a family or household member who is a child, and if the dispatcher has ready access to magistrate court records that show whether there are conditions of bail, the dispatcher should consult the records and radio any relevant information to the responding law enforcement officers; including a protective order prohibiting the possession of firearms.

§149-3-6. Initial Law Enforcement Officer Response.

6.1. A law enforcement agency, under WV Code §48-27-601, shall immediately follow its procedures for investigating a missing person if the agency:

6.1.a. Has possession of a valid protective order, or has notice of the existence of a protective order which is in effect, or has been expired for a period of less than thirty (30) days, and receives a report that a person protected by the order has been reported to be missing; or,

6.1.b. Receives a missing person report accompanied by a sworn affidavit that the person at the time of the alleged disappearance was being subjected to treatment, which constitutes domestic battery or assault as defined in subdivisions 3.2.4 and 3.2.5 of this rule.

6.1.2. An agency or department shall not have a policy delaying the beginning of an investigation of a missing person, which meets the criteria outlined in this subsection.

6.2. Approaching the scene.

6.2.1. Whenever possible, two law enforcement officers shall respond to a domestic call. The responding law enforcement officers should approach the scene of a domestic incident as one of high risk.

6.2.2. The law enforcement officers should obtain all available information from the dispatcher before arriving at the scene and should notify the dispatcher upon arrival.

6.2.3. Unless the circumstances of a particular incident require different measures, the law enforcement officers should follow the approach procedures set out in the remainder of this section. The law enforcement officers should:

6.2.3.a. Approach the scene inconspicuously. The law enforcement officers should not use sirens or lights in the immediate area of the scene of the incident;

6.2.3.b. Park away from the immediate scene of the incident;

6.2.3.c. Keep a safe exit route in mind;

6.2.3.d. Be alert for the employment of weapons from doors, windows, or nearby vehicles;

6.2.3.e. Be alert for persons moving away from the immediate scene of the incident; and,

6.2.3.f. Employ other standard precautionary measures for approaching high risk incident scenes.

6.3. Initial contact.

6.3.1. The responding law enforcement officers should identify themselves, explain the law enforcement presence, and request entry into the home or business. The law enforcement officers should ask to see the person who is the subject of the call. The law enforcement officers should not reveal the caller's name.

6.3.2. The law enforcement officers may enter and conduct a search of the premises relevant to the incident if written or verbal consent has been given to do so. If a domestic relations protective order is in effect, written consent to enter may have been given by the victim and be on file. The law enforcement officers shall limit the search to a search for other suspects, victims, witnesses, or evidence connected with the alleged domestic incident.

6.3.3. If refused entry, the law enforcement officers should be persistent about seeing and speaking alone with subject of the call. If access to the subject is refused, the law enforcement officers should request the dispatcher to contact the caller if the caller is the subject of the call and communicate between the law enforcement officers and the caller. If the law enforcement officers leave the scene, the law enforcement officers should drive by premises and observe it frequently. If the law enforcement officers remain to observe premises, the law enforcement officers should move to public property (the street) and observe the premises.

6.3.4. In some circumstances, forced entry is necessary and appropriate. Forced entry may be appropriate when the residence area shows signs of a fight or scuffle; or when a person from inside the residence calls for assistance or is yelling; or when a person from inside is visible and the law enforcement officers observe that the person is wounded, injured, or is otherwise in need of assistance.

6.4. Establishing control of scene.

6.4.1. Once at the immediate scene of the incident, the responding law enforcement officers should establish control by:

6.4.1.a. Identifying and securing potential weapons in the surroundings;

6.4.1.b. Separating the victim and the accused when circumstances are appropriate;

6.4.1.c. Assessing injuries (including inquiry about possible internal injuries), administering first aid, and/or notifying emergency medical services;

6.4.1.d. Identifying all occupants and witnesses on the premises; and,

6.4.1.e. Separating occupants and witnesses from the victim and accused and keeping them out of hearing range (to avoid compromising their witness status).

6.5. On-scene investigation.

6.5.1. The law enforcement officers should conduct an investigation using the same procedures that the law enforcement officers would use in any other on-scene criminal investigation. While conducting the investigation the law enforcement officers should attempt to establish the existence of credible corroborative evidence. The law enforcement officers should make specific note of and document all statements made by the victim, accused and all witnesses, particularly those statements that may be admissible as evidence as exceptions to the hearsay rule such as excited utterances, present sense impression and statements made for medical treatment. The law enforcement officers should also determine if such statements were made to the dispatcher and take appropriate measures to secure and preserve such evidence.

6.5.2. The law enforcement officers should ensure the victim's safety and privacy by interviewing the victim in an area apart from the accused, witnesses, and bystanders if possible.

6.5.3. In questioning the victim, the law enforcement officers should use supportive interview techniques. The law enforcement officers should ask the victim about previous domestic incidents and their frequency and severity. The law enforcement officers should not tell the victim what action the law enforcement officers intend to take until all available information has been collected.

6.5.4. The law enforcement officers should interview the victim and/or any witnesses (including all child witnesses) as fully and as soon as circumstances allow, taking down names, addresses, and other relevant information. When interviewing the victim and/or any witnesses (including all child witnesses) law enforcement officers should determine whether the victim and/or any witnesses (including all child witnesses) allege facts that constitute all of the elements of assault or battery. If so, the law enforcement

officers should inquire whether the victim and/or any witnesses are willing to sign a statement containing those facts. The law enforcement officers should also inquire about past abuse or other crimes to aid the law enforcement officers in evaluating the dangerousness of the accused. The law enforcement officers should proceed with the investigation even in the absence of a statement from either a victim and/or any witnesses (including child witnesses).

6.5.5. The responding law enforcement officers should interview the accused as fully as circumstances allow inquiring about the nature of the dispute. The law enforcement officers should be alert to possible incriminating statements.

6.5.6. In the collection of evidence and taking of statements, the law enforcement officers shall protect the constitutional rights of the accused in accordance with current laws and statutes of the state of West Virginia and of the United States.

6.5.7. Children should be interviewed in a manner appropriate to the child's age. Signs of trauma and any apparent healing wounds on the child should be noted by the law enforcement officers.

6.5.8. If the accused has fled the scene, the law enforcement officers should solicit information as to the possible whereabouts of the accused (place of employment, relatives, friends, etc.). The law enforcement officers should make reasonable efforts to locate and interview the accused as to any statements or evidence they may wish to provide prior to arrest or the obtaining of a warrant.

6.6. Enforcing any protective order.

6.6.1. If the dispatcher has not advised the law enforcement officers of the existence of a protective order or conditions of release on bail set in a crime against a family or household member, including children, or the existence of a protective order prohibiting the use or possession of a firearm or deadly weapon, the law enforcement officers should ask the victim whether there is an order or bail conditions. If so, the law enforcement officers should ask the victim if he or she can produce a copy of the protective order or bail document or identify the county and court or magistrate from which the order or document was issued. The law enforcement officers should attempt to contact the local law enforcement department specified by the victim to verify the existence of a valid protective order or contact the magistrate court to verify the conditions of release on bail. The law enforcement officers shall enforce all orders from the magistrate court or any court regardless of certification. Where the accused has been served with the protective order or has actual notice of the protective order, then the law enforcement officers shall follow the arrest authorization provisions as set forth in subdivisions 7.2.3. through 7.2.5. of this rule.

6.6.2. Where the accused has not been served and has not had actual notice of the order, if the law enforcement officers have a copy to serve upon the accused, they shall serve it. If the law enforcement officers do not have a copy to serve, then the law

enforcement officers shall give the accused actual notice of the provisions of the order by stating the provisions of the order to the accused. If the accused, after having been served with or given actual notice of the order, then refuses to comply with the order, the law enforcement officers shall follow the arrest provisions as set forth in subdivisions 7.2.3. through 7.2.5. of this rule.

6.6.3. When the law enforcement officers observe any violations of a known bail condition in cases of crimes between family or household members, including family or household members who are children, the law enforcement officers shall arrest the accused for violations of the bail conditions; which may include the presence of the accused at the home of the victim.

6.6.4. The law enforcement officers shall enforce all protective or similar type orders that have been issued by a circuit judge, family court judge or magistrate of this state, and from courts of another state, territory, or tribe.

6.7. Further on-scene investigation.

6.7.1. The law enforcement officers shall collect and preserve all physical evidence reasonably necessary to support prosecution, including evidence substantiating the victim's injuries, evidentiary articles that substantiate the attack (weapons, torn clothing, etc.), and evidence recording the crime scene. The law enforcement officers should ensure that photographs are taken of visible injuries on the victim and of the crime scene. All physical evidence shall be collected, noted in reports, and vouchered as in other criminal investigations. Sections 3 through 12 of this rule contain requirements for reporting and data collection.

6.7.2. The law enforcement officers should encourage the victim to seek medical attention for injuries that do not require emergency treatment at the scene. The law enforcement officers should inquire about injuries of the victim that are concealed by clothing or otherwise not readily apparent. The law enforcement officers should advise the victim to have photographs taken if injuries appear later.

§149-3-7. The Arrest Decision.

7.1. In most circumstances, the responding law enforcement officers shall arrest the accused whenever arrest is authorized. If no arrest is made, the law enforcement officers shall include in the report of the incident an explanation of the reasons why an arrest was not made.

7.2. Arrest is authorized in the following circumstances:

7.2.1. When the law enforcement officers have probable cause to believe that the accused has committed a felony;

7.2.2. When the law enforcement officers observe the commission of a felony or a

misdemeanor;

7.2.3. Law enforcement officers observing the violation of a valid protective order, including the presence of the accused at a location prohibited by the protective order; issued by a circuit judge, family court judge or magistrate of this state and from courts of another state, territory, or tribe; the officers shall arrest the accused provided the accused was served with the order or had actual notice of the order and its contents;

7.2.4. When the law enforcement officers observe any violation of a condition of bail, probation or parole, including the presence of the accused at the home of the victim in violation of the condition set in cases of crimes between family members, including family or household members who are children;

7.2.5. When the accused is alleged to have committed domestic assault and/or domestic battery or the violation of a valid protective order; issued by a circuit judge, family court judge or magistrate of this state or from another state, territory, or tribe; law enforcement officers have authority to arrest the alleged perpetrator when:

7.2.5.a. The law enforcement officers have observed credible corroborative evidence that the offense has occurred and, either:

7.2.5.a.1. The law enforcement officers have received, from the victim or a witness, a verbal or written allegation of facts constituting a violation of a domestic assault or domestic battery or violation of a valid protective order; or,

7.2.5.a.2. The law enforcement officers have observed credible evidence that the accused committed the offense;

7.2.6. When a misdemeanor or felony not included among those specified in subdivisions 7.2.2. through 7.2.5. of this rule has been committed and the law enforcement officers or another person obtains or has previously obtained an arrest warrant; or,

7.2.7. When a capias has been issued, or when a circuit judge has signed an attachment order.

7.3. The law enforcement officers shall not consider the following factors in making the arrest decision:

7.3.1. The marital status of the parties;

7.3.2. The ownership or tenancy rights of either party;

7.3.3. Verbal assurances that the violence will stop;

7.3.4. A claim by the accused that the victim provoked or perpetuated the violence;

7.3.5. Speculation that the victim will not follow through or cooperate with criminal prosecution (whether based on prior incidents involving the same victim, the victim's hesitancy about pursuing prosecution, or any other factor);

7.3.6. The disposition of any previous police calls involving the same victim or accused;

7.3.7. Speculation that the arrest may not lead to a conviction;

7.3.8. The existence or nonexistence of a current protective order (except insofar as the violation of the order requires arrest);

7.3.9. Concern about reprisals against the victim;

7.3.10. Adverse financial consequences that might result from the arrest;

7.3.11. That the incident occurred in a private place; or,

7.3.12. The racial, cultural, social, political, or professional position, or sexual orientation of either the victim or the accused.

7.4. It is the law enforcement officers' and/or prosecuting attorney's responsibility to decide whether an arrest should be made unless law enforcement officers are required to make an arrest for violation of a valid protective order and/or a violation of the terms and conditions of bail, probation or parole on a charge of a crime against a family or household member. The law enforcement officers, therefore, should not consider the victim's opposition to arrest and should emphasize to the victim, and to the accused as well, that the criminal action thus initiated is the state's action, not the victim's action.

7.5. If law enforcement officers receive complaints of domestic or family violence from two or more opposing persons, the law enforcement officers shall evaluate each complaint separately to determine who was the primary aggressor. If the law enforcement officers determine that one person was the primary aggressor, the law enforcement officers shall arrest the primary aggressor only. In determining whether a person is the primary aggressor the law enforcement officers should consider, among other things:

7.5.1. Prior complaints of domestic or family violence;

7.5.2. The relative severity of the injuries inflicted on each person;

7.5.3. The likelihood of future injury to each person; and,

7.5.4. Whether one of the persons acted in self-defense.

7.6. Law enforcement officers shall not:

7.6.1. Threaten, suggest, or otherwise indicate the possible arrest of all parties to discourage requests for intervention by law enforcement by any party; or,

7.6.2. Base the decision to arrest on:

7.6.2.a. The specific consent or request of the victim; or,

7.6.2.b. The law enforcement officers' perception of the willingness of a victim of or witness to domestic or family violence to testify or otherwise participate in a judicial proceeding.

7.7. In addition to any other report required, law enforcement officers who do not make an arrest after investigating a complaint of domestic or family violence or who arrest two or more persons for a crime involving domestic or family violence, shall submit a written report setting forth the grounds for not arresting or for arresting both parties.

7.8. The law enforcement officers shall arrest for the commission of a crime of domestic or family violence.

7.8.1. The law enforcement officers shall seize all deadly weapons that are alleged to have been involved or threatened to be used in the commission of domestic or family violence, including those firearms held in violation of a protective order prohibiting possession of a firearm; and,

7.8.2. May seize a weapon that is in plain view of the officers or was discovered pursuant to a consensual search, as necessary for the protection of the officers or other persons.

7.9. Notwithstanding the issue of violation of the West Virginia Code §61-7-7, the possession of a firearm by a person subject to a valid protective order, is also a violation of federal law and should be referred to federal authorities.

7.10. Notwithstanding the issue of violation of the state law, the crossing or causing the crossing of a state line or territory or tribal boundary to violate a valid protective order is a violation of federal law and should be referred to federal authorities.

7.11. Notwithstanding the issue of violation of the state law, the crossing or causing the crossing of a state line or territory or tribal boundary to commit domestic violence is a violation of federal law and should be referred to federal authorities.

§149-3-8. Effectuating the Arrest.

8.1. Persons arrested pursuant to subdivision 7.2. of this rule, shall be taken before a magistrate within the county in which the offense charged is alleged to have been committed in a manner consistent with the provisions of Rule 1 of the Administrative Rules for the Magistrate Courts of West Virginia.

8.2. The risk is high in domestic violence cases that the accused will return to the victim's residence or the scene of the violence. If the accused has fled the scene, the law enforcement officers should initiate procedures to pursue and apprehend the accused as promptly as possible if the presence of the accused in the vicinity represents a continuous threat to the safety of the victim and/or other members in the household. If a warrant is necessary, the law enforcement officers should obtain and execute the warrant as soon as practical.

8.3. When the accused is a minor (under 18 years of age), the provisions of this rule are fully applicable, except that the law enforcement officers should arrest and process the juvenile pursuant to W. Va. Code §49-5-1 et. seq.

§149-3-9. Procedure when Arrest is not Authorized or, if Authorized, is not Made.

9.1. If an arrest is not authorized because of the absence of probable cause to believe that a crime was committed, or if arrest is authorized but not made (for reasons to be included in the incident report), the law enforcement officers should:

9.1.1. Explain to the victim the reasons that an arrest is not being made;

9.1.2. Advise the victim of the applicability of criminal laws, procedures for filing a criminal complaint, the availability of a petition for a protective order, the procedures for filing a petition, and the remedies an order may contain;

9.1.3. Encourage the victim to contact the nearest available domestic violence program for information regarding services available to victims of domestic violence;

9.1.4. Advise the victim that the law enforcement officers will provide transportation for or facilitate transportation of the victim to a shelter or the appropriate court when reasonable cause exists to believe that the victim suffered or is likely to suffer physical injury.

9.1.5. Provide transportation for or facilitate transportation of the victim upon the request of the victim to a shelter or the appropriate court when reasonable cause exists to believe the victim has suffered or is likely to suffer physical injury.

9.2. The law enforcement officers should not become involved in the disposition of personal property, the ownership of which is in dispute except as provided in subdivision 9.3. of this section. In the absence of an arrest, the law enforcement officers should remain neutral and be concerned primarily with maintaining the peace and safety of those persons present.

9.3. The law enforcement officers shall provide for the safety of the parties when they are ordered to accompany one or both of the parties to obtain personal property or other items from a location, including temporary possession of motor vehicles owned by either or

both of the parties.

§149-3-10. Other On-Scene Assistance to Victims and Dependents.

10.1. Whether or not an arrest is made, the responding law enforcement officers should not leave the scene of the incident until the situation is under control and the likelihood of immediate violence has been eliminated. The law enforcement officers should stand by for a reasonable period of time while victims or other persons desiring to leave gather necessities for short-term absences from home, such as clothing, medication, and necessary documents.

10.2. Whether or not an arrest is made, the responding law enforcement officers are required by W. Va. Code §48-27-702 to notify the victim orally or in writing of the availability of a shelter, including its telephone number, or other services in the community, and of civil and criminal remedies.

10.3. If an arrest is made or an arrest warrant obtained, the law enforcement officers should:

10.3.1. Advise the victim of what procedure will happen next, including the probability that the accused will be in custody for only a short period of time; and

10.3.2. Obtain from the victim information to be included in the arrest report indicating any special conditions of bail that should be requested at the initial appearance before the magistrate (i.e., places where the accused should be specifically prohibited from appearing).

10.4. Law enforcement officers responding to an alleged incident of abuse shall inform the parties to the incident of the availability of the possible remedies provided by the Prevention of Domestic Violence Act (W. Va. Code §48-27-101 et. seq.) and the possible applicability of criminal laws.

10.5. Law enforcement officers responding to an alleged incident of abuse shall, in addition to providing the information required in subdivision 10.4. of this rule, provide transportation for or facilitate transportation of the victim, upon the request of the victim, to a shelter or the magistrate court when there is reasonable cause to believe that the victim has suffered or is likely to suffer physical injury.

10.6. Elderly victims or physically dependent victims.

10.6.1. When a victim of domestic violence is elderly or physically dependent, the accused is the sole caretaker and an arrest is indicated, or when the victim of domestic violence is the sole caretaker of an elderly or of a physically dependent person, and the victim can no longer provide care (as, for example, when the victim is hospitalized), the responding law enforcement officers should determine whether the elderly or physically dependent person is physically endangered, either as a result of the abuse, a pre-existing

medical condition, or the absence of a caretaker. If the elderly or physically dependent person is physically endangered and mentally alert, the law enforcement officers should ask the elderly or physically dependent person for the name of a relative or friend who can be contacted immediately to assist the elderly or physically dependent person. The law enforcement officers shall facilitate transportation of the elderly or physically dependent person to a relative or friend, if one can be found.

10.6.2. If there is no one available to assist the elderly or physically dependent person, or if the elderly or physically dependent person appears not to be mentally alert, the law enforcement officers should make an emergency referral to Adult Protective Services. The law enforcement officers should remain at the residence until the Adult Protective Services worker arrives, or should transport the elderly or physically dependent person to a medical facility, or other appropriate place where the elderly or physically dependent person can wait for the worker.

10.6.3. In addition to providing the notification required by other provisions of this rule, the law enforcement officers should advise the elderly or physically dependent person of the availability of protective services through Adult Protective Services.

10.7. Child victims and dependents.

10.7.1. When the victim of abuse is a minor child, the law enforcement officers shall arrest the accused if the law enforcement officers observe the commission of a crime and shall report to Child Protective Services, as required by W. Va. Code §49-6A-2 et seq. If the child is physically injured, the law enforcement officers should facilitate the transportation of the child to the nearest hospital for treatment. The law enforcement officers should provide the victim notification, as described in this rule, to an adult caretaker of the child who is not the perpetrator of the abuse.

10.7.2. If the accused is arrested and was the sole caretaker of a child, and/or if the victim is the sole caretaker of a child and can no longer provide care (as, for example, when the victim is hospitalized), or if both caretakers are arrested, the law enforcement officers may determine whether there is a responsible relative who can care for the child and, if so, may contact that relative and await the relative's arrival, or the law enforcement officers may contact Child Protective Services and remain at the residence until a protective services worker arrives or take the child into custody pursuant to the Child Welfare Law (W. Va. Code §49-5-8 and 49-6-9). If no responsible relative is available, the law enforcement officers should contact Child Protective Services and remain at the residence until a protective services worker arrives or should take the child into custody pursuant to the Child Welfare Law (W. Va. Code §49-5-8 and 49-6-9).

§149-3-11. Processing the Accused.

11.1. A person arrested for violation of a protective order shall be charged with any crimes properly charged as a result of the incident in which the violation occurred.

11.2. The accused shall be taken before a magistrate in the county in which the offense charged is alleged to have been committed in a manner consistent with the provisions of Rule 1 of the Administrative Rules for the Magistrate Courts of West Virginia for initial appearances in criminal cases.

11.3. The arresting law enforcement officers may inform the magistrate or court of any circumstances surrounding the arrest of the accused which would have an effect on conditions of bail, provided that the amount and conditions of bail are a judicial decision that rests solely with the magistrate or court.

§149-3-12. Reporting.

12.1. A Domestic Violence Incident Report, as required by W. Va. Code §48-27-801, shall be completed by the law enforcement officers responding to any call covered by this rule.

12.2. Data collection.

12.2.1. All written reports on the same person shall be kept together or cross-referenced so that repeat domestic violence can be monitored.

12.2.2. The written report, or another document (such as an index card) or computer entry generated from the written report, shall become a domestic violence tracking report.

12.2.3. To the extent possible, the domestic violence tracking report shall be accessible to dispatchers and law enforcement officers.