

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
KEN HECHLER  
**ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In this Box

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JUN 29 2 21 PM '93

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

Governors Committee on Crime Delinquency  
AGENCY: and Correction TITLE NUMBER: 149

RULE TYPE: Legislative Rule; CITE AUTHORITY 48-2A-9

AMENDMENT TO AN EXISTING RULE: YES X 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 NEW RULE BEING PROPOSED:                     

TITLE OF RULE BEING PROPOSED:                     

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 29, 1993 AT 3:00pm

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Governors Committee on Crime,  
Delinquency and Correction  
1204 Kanawha Blvd. East  
Charleston, WV 25301  
Attention: Protocol for Law Enforcement  
Response to Domestic Violence

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



6.80

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

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SECRETARY OF THE ARMY



STATE OF WEST VIRGINIA  
GOVERNOR'S OFFICE  
OF  
COMMUNITY AND INDUSTRIAL DEVELOPMENT

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GASTON CAPERTON  
GOVERNOR

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE  
Charleston, West Virginia 25305

State of Circumstances

The Governor's Committee on Crime, Delinquency and Correction is mandated under 48-2A-9 of the Code of West Virginia to develop and promulgate rules for state, county, and municipal law enforcement agencies regarding their duties with respect to domestic violence.

Summary of Proposed Rules

The principle purpose of these rules and regulations is to establish guidelines and procedures to be followed by police officers and other personnel involved in the police response to domestic violence calls.

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RECORDS SECTION  
OFFICE OF THE ATTORNEY GENERAL

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APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Protocol for Law Enforcement Response to Domestic Violence OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Type of Rule:  Legislative  Interpretive  Procedural

Agency Governors Committee on Crime, Delinquency and Correction

Address 1204 Kanawha Boulevard East

Charleston, West Virginia 25301

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

There are no direct expenses associated with implementation of the protocol beyond the current capacity of law enforcement agencies.

3. Objectives of these rules:

To provide guidelines for police agencies and officers in response to domestic violence complaints.

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APR 25 1953

OFFICE OF THE ATTORNEY GENERAL  
STATE OF MISSISSIPPI

Rule Title: Protocol for Law Enforcement Response to Domestic Violence

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date: \_\_\_\_\_

Signature of Agency Head or Authorized Representative

James M. Allert

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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Proposed Emergency Rule,  
and  
Amendments Proposed for Authorization by Legislature,  
To Conform Existing Authorized Rule  
To H.B. 2427 Passed by the 1993 Legislature, and  
To "The Family Protection Act of 1992"

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**KEY TO MARKINGS**

Underlined language is new language required by 1992 or 1993 legislation.

In addition there are some "cleanup" and other changes that are also underlined. These include, but are not limited to, expanded section headings, elimination of the word "assailant", noting the officer's authority to arrest pursuant to a capias, correcting the instruction of when to "Mirandize" the accused, and, most importantly, a change in the procedures officers should use when arriving at a domestic violence scene to procedures which further study has shown will be less dangerous to the officers.

Language which is ~~struckthrough~~ is language which is to be deleted from the version of the Rule which was most recently authorized as a final Rule by the legislature. (When section numbers are changed to accommodate new sections, the old section number is not always shown and overstruck.)

A previous Emergency Rule was filed January 8, 1993, but was not submitted to the legislature in time for its authorization as a final rule by the 1993 legislature. Language which was new in that Emergency Rule, but which had to be deleted to propose this version, has been entirely removed, and it is not shown in any form.

For a version of this Rule which is marked to show which underlined changes were 1992, 1993, "clean up" or other, contact the Governors Committee on Crime, Delinquency and Corrections.

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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

SERIES 3  
POLICE RESPONSE TO DOMESTIC VIOLENCE

1. §149-3-1. General.

1.1. Scope. -- These legislative rules establish law enforcement response to domestic violence.

1.2. Authority. -- W. Va. Code 48-2A-9

1.2. Filing Date. --

1.3. Effective Date. --

2. §149-3-2. Purposes.

2.1. The principal purpose of these rules and regulations is to establish guidelines and procedures to be followed by police officers and other personnel involved in the police response to domestic calls.

2.2. Other purposes and goals of this protocol 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 officer safety by ensuring that 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.

3. §149-3-3. Scope of Coverage; Definitions; Domestic Violence Protective Orders.

3.1. 2-1- For purposes herein unless specifically stated otherwise, the term "officer", "law-enforcement officer", or "police officer" shall refer to a chief, sergeant or member of any municipal police force or department any city police officer, a sheriff, a sheriff's deputy, an appointed security officer of a state university or college, or the Superintendent, or an officer or member of the West Virginia Division

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of Public Safety West Virginia State Police.

3.2. 3-1. As used herein, unless the context clearly requires otherwise:

3.2.1. 3-1-1. "Family violence" or "Abuse" means the occurrence of one or more of the following acts between family or household members who reside together or who formerly resided together:

3.2.1.1. 3-1-1-1. Attempting to cause or intentionally, knowingly or recklessly causing physical harm ~~bodily injury~~ with or without dangerous or deadly weapons;

3.2.1.2. 3-1-1-2. Placing another in reasonable apprehension of physical harm by ~~physical menace~~ another in fear of imminent serious ~~serious~~ bodily injury;

3.2.1.3. 3-1-1-3. Creating fear of physical harm ~~bodily injury~~ by harassment, psychological abuse or threatening acts;

3.2.1.4. 3-1-1-4. Causing or attempting to cause another to engage involuntarily in any sexual act by force, threat of force, or duress; Sexual abuse.

3.2.1.5. 3-1-1-5. Holding, confining, detaining or abducting another person against that person's will.

3.2.2. 3-1-2. "Family or household member" means spouses, persons living as spouses, persons who formerly resided as spouses, parents, children and step-children, current or former sexual or intimate partners, ~~or~~ other persons related by

blood or marriage, persons who are presently or in the past have resided or cohabitated together, or a person with whom the alleged victim has a child in common. Consanguinity or affinity. Consanguinity is defined as a "blood relationship." Affinity is defined as "as a result of marriage, the relationship that exists between one spouse and the blood relatives of the other spouse."

3.2.3. 3-1-3. "Sexual abuse" has the same meaning as the definitions of "sexual assault" and "sexual abuse" in the West Virginia Code.

3.3. 3-2. Domestic violence protective orders are to be considered criminal in nature. Any and all law enforcement officers who are sworn officers in the State of West Virginia shall be 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 officers shall refuse to serve pleadings or orders in domestic violence protective order actions.

3.4. 3-3. A protective order is in effect for as long as the order says it is in effect except:

3.4.1. 3-3-1. A protective order loses its effectiveness if a temporary circuit court order which does not extend the protective order is signed by a family law master or judge, or if a final order is signed by a judge, if:

3.4.1.1. 3-3-1-1. The temporary or final order was entered in a divorce, separate maintenance or annulment action

between the same parties, and

3.4.1.2. 3.3.1.2. The temporary or final order was entered after the date of the issuance of the protective order.

3.4.2. 3.3.2. A protective order's effectiveness is extended beyond the date the order says it expires if:

3.4.2.1. 3.3.2.1. The protective order has been extended by another order in the same case, or;

3.4.2.2. 3.3.2.2. A divorce, separate maintenance or annulment suit between the same parties has been filed while the protective order is still in effect by its own terms.

3.5. 3.4. An order issued in any county in West Virginia is in effect in all counties in West Virginia.

3.6. 3.5. Any protective order issued by the court of another state shall be given full faith and credit and enforced as if it was an order of this state if its terms and conditions are substantially similar to those which may be imposed by this state.

#### 4. §149-3-4. Dispatch.

4.1. Dispatchers under the supervision of a police department or who serve multiple police departments should 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.

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

4.2.1. The nature of the incident;

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

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

4.2.4. Whether weapons are involved;

4.2.5. Whether an ambulance is needed;

4.2.6. Whether the suspect is present and, if not, the suspect's description, direction of flight, and mode of travel;

4.2.7. Whether children are at the scene;

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

4.2.9. Whether a protective order is in effect and whether an affidavit to enter the premises exists; and

4.2.10. Whether a criminal warrant is outstanding on the suspect; and

4.2.11. Whether the

suspect has been released on bail on a charge of a crime against a family or household member, or an assault or other offense against a child, with conditions on bail regarding contact with the victim or complainant.

4.3. 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 officer. The dispatcher should tell the caller that help is on the way and when the caller can expect the police to arrive.

4.4. 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 such records and radio any relevant information to the responding officer.

4.5. If the dispatcher has reason to believe that the subject is on bail for a crime against a family or household member or an assault or other offense against a child, and if the dispatcher has ready access to magistrate court records that show whether there are conditions on bond, the dispatcher should consult such records and radio any relevant information to the responding officer.

**5. §149-3-5. Initial Police Officer Response.—** Approaching the Scene; Initial Contact; Establishing Control of the Scene; Arresting at the Scene; Continuing Custody; Release from Custody; On Scene Investigation.

5.1. Approaching the scene.

5.1.1. The responding officer should approach the scene of a domestic dispute as one of high risk. Whenever possible, two officers will respond to a domestic call.

5.1.2. The officer should obtain all available information from the dispatcher before arriving at the scene and should notify the dispatcher upon arrival.

~~5.1.3. The officer should be alert for assailants leaving the scene and for the employment of weapons from doors, windows, or nearby vehicles.~~

~~5.1.4. The officer otherwise should employ standard precautionary measures in approaching the scene of the incident.~~

5.1.3. Most officers injured in domestic violence responses are harmed during the approach to the incident. The incidence of ambush is two and one-half times higher in domestic situations than in responding to other types of incidents. Unless the circumstances of a particular incident require different measures, follow the approach procedures set out in the remainder of this section.

5.1.4. Approach the scene inconspicuously. Do not use sirens or lights in the immediate area of the scene of the incident.

5.1.5. Do not park directly in front of the immediate scene of the incident.

5.1.6. Keep a safe exit route in mind.

5.1.7. Be alert for the employment of weapons from doors, windows, or nearby vehicles.

5.1.8. Be alert for persons moving away from the immediate scene of the incident.

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

5.2. Initial contact with occupants.

5.2.1. The responding officer should identify himself the officer as a police officer, explain his the officer's presence, and request entry into the home or business. The officer should ask to see the person who is the subject of the call. If the person who called the police is someone other than the subject of the call, the officer should not reveal the caller's name.

5.2.2. The officer may enter and conduct a search of the premises relevant to the incident if consent has been given to do so. If a domestic relations protective order is in effect, written consent to entry may have been given by the victim and be on file. The search will be limited to search for other suspects, victims, witnesses or evidence connected with the alleged domestic incident.

5.2.3. If refused entry, the officer should be persistent about seeing and speaking alone with subject of the call. If access to the subject is refused, the officer should request the dispatcher to contact the caller if the caller is the subject of the call. If the

officer leaves the scene, the officer should drive by and observe frequently. If the officer remains to observe, the officer should move to public property (the street) and observe the premises. In some circumstances, forced entry will be necessary and appropriate. Forced entry may be appropriate when the residence areas 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 officer observes that the person is wounded, injured or is otherwise in need of assistance.

5.3. Establishing Control of Scene. Once at the immediate scene of the incident ~~inside~~, the responding officer should establish control by:

5.3.1. Identifying potential weapons in the surroundings;

5.3.2. Separating the victim and the assailant accused when circumstances are appropriate;

~~5.3.3. 5.3.4.~~ Assessing injuries (including inquiry about possible internal injuries), administering first aid, and/or notifying emergency medical services;

~~5.3.4. 5.3.5~~ Identifying all occupants/witnesses on the premises; and

~~5.3.5. 5.3.6~~ Separating occupants/witnesses from the victim and accused and keeping them out of hearing range (to avoid compromising their witness status).

~~5.3.6. 5.3.3.~~

Restraining the assailant accused if necessary, and removing the assailant accused to the patrol car if immediate arrest is warranted authorized because the officer observes a violation of a bail condition, because the officer observes a violation of a protective order, because the officer observes the commission of a felony or misdemeanor, because the officer has probable cause to believe that the suspect has committed a felony, because an arrest warrant or circuit court attachment order has previously been obtained or a capias has been issued, or because arrest is authorized under the next subdivision of this Section;

5.3.7. Arresting the accused at the scene. Arresting the accused at the scene of the alleged violation is authorized by this subdivision for the purpose of protecting the health or safety of either the alleged victim, the officer, or another person at the scene of the violation while the officer is obtaining the written statement of a victim or witness required in 5.3.4.3. or seeking the magistrate's authorization for arrest required in 6.3.4.3. The arrest authorized by this subdivision may only be made when:

5.3.7.1. Circumstances exist which convince the officer that a danger exists to the health and safety of the alleged victim, the officer or another person; and

5.3.7.2. The officer determines that credible corroborative evidence exists, as that term is defined in Section 6.3.7. of this Rule, to believe that an assault or a battery of a family or household

member has occurred; and

5.3.7.3. The officer either a) has obtained a signed statement from the alleged victim or a witness that the essential elements of the offense occurred or b) has been presented with verbal evidence sufficient to establish the occurrence of the essential elements of the offense and been informed of a willingness of the victim or a witness to execute a signed statement.

5.3.8. The officer may continue to keep an accused person who was arrested pursuant to Subdivision 5.3.7. of this Section in custody as provided and limited by the following subdivisions:

5.3.8.1. Because the purpose of an arrest pursuant to subdivision 5.3.7 of this section is only to protect the victim, the officer, or another person at the scene of the alleged offense, while the officer obtains a written statement and/or authorization from a magistrate, the officer generally only has the authority to keep the accused in custody at the scene. If authorization is obtained from the magistrate, the officer should then follow the relevant procedures set out in the other provisions of this Rule to investigate the scene, effectuate the arrest, process the accused, provided other on scene assistance and so on.

5.3.8.2. If the victim or witness who was willing to make a written statement then refuses to do so, the accused must be immediately released. If this occurs the officer should provide for the safety of the victim and other persons to the extent possible, including

using the procedures set out in Sections 8 and 9 of this Rule. In addition, the officer should always, if possible, advise the victim before the release that the accused is going to be released. If it is not possible to advise the victim before the release, the officer should always immediately take steps reasonably calculated to advise the victim of the release as soon as possible.

5.3.8.3. If the officer, or another officer acting at the request of the officer making the arrest, is able to communicate with a magistrate and the magistrate denies authorization for arrest, the accused must be immediately released. If this occurs the officer should provide for the safety of the victim and other persons to the extent possible, including using the procedures set out in Sections 8 and 9 of this Rule. In addition, the officer should always, if possible, advise the victim before the release that the accused is going to be released. If it is not possible to advise the victim before the release, the officer should always immediately take steps reasonably calculated to advise the victim of the release as soon as possible.

5.3.8.4. The officer should only take the accused from the scene in custody without authorization from the magistrate as required by Section 6.3.4.3 of this Rule if all of the following conditions apply: A) A proper written statement by a victim or other person has been signed; and B) After making every practicable effort to communicate with the magistrate (See Section 7.3.3 of this Rule) the officer has not been able to communicate with the magistrate; and C) Circumstances exist which convince

the officer that a danger continues to exist to the health and safety of the alleged victim, the officer or another person who was at the scene if the accused is released before the officer can communicate with a magistrate. If the officer takes the accused from the scene in custody without authorization from the magistrate pursuant to this subdivision, the officer must follow the procedures in the next subdivision (5.3.8.5) of this Section.

5.3.8.5. Leaving scene before arrest "authorized". If the officer takes the accused from the scene in custody pursuant to the immediately preceding subdivision of this Section (5.3.8.4) or Section 7.2.3 of this Rule without authorization from the magistrate, the officer must proceed directly to a location where the officer reasonably expects to be able to request telephonic or oral authorization from a magistrate. Such locations include, but are not limited to, a nearby phone, an area where the officer's radio will work so the officer may communicate or arrange to communicate with the magistrate at the magistrate's office or the magistrate's other location. If the officer is proceeding to the magistrate's office or the magistrate's other location, the officer must continue to use the officer's radio to communicate with the magistrate or, if practicable, to arrange to communicate with the magistrate before going that far. In no case shall the officer keep the accused in custody later than the next required time for the on call magistrate to contact the jail and appear as provided for initial appearances in criminal cases in Rule 1 of the Administrative Rules for the

Magistrate Courts in West Virginia. The accused may be detained in the same warrant as a person under arrest for any other misdemeanor.

5.3.9. When arrest is made pursuant to subdivision (5.3.7) of this section see also:

-Section 6.3.6. of this Rule regarding communications through a dispatcher;

-Section 6.3.7. of this Rule regarding the definition of "credible corroborative evidence;

-Section 6.4. of this Rule regarding factors not to be considered in making the arrest;

-Section 6.5. of this Rule regarding the officer's decision to make the arrest;

-Section 7 of this Rule regarding effectuating the arrest; and

-Section 10 of this Rule regarding processing the accused.

#### 5.4. On-scene investigation.

5.4.1. The officer should conduct an investigation using the same procedures that the officer would use in any other on-scene criminal investigation unless the procedures provided by this Rule, which are specially applicable for police officer response to domestic violence, require different procedures.

5.4.2. While conducting the investigation the officer should attempt to establish the existence of credible corroborative evidence and the willingness of the victim or another witness to sign a written statement. These are requirements for the officer to arrest the accused for an assault or battery against a family or household member without a warrant upon telephonic or oral authorization

by a magistrate.

5.4.3. 5.4.1. The responding officer should interview the victim and the assailant as fully as circumstances allow to inquire about the nature of the dispute. The officer should be alert to possible incriminating statements.

5.4.4. 5.4.2 The officer should ensure the victim's safety and privacy by interviewing the victim in an area apart from the assailant accused, witnesses, and bystanders if possible.

5.4.5. 5.4.2 In questioning the victim, the officer should use supportive interview techniques. The officer should ask the victim about previous domestic incidents, their frequency and severity. The officer should not tell the victim what action the officer intends to take until all available information has been collected.

5.4.6. When interviewing the victim the officer should determine whether the victim alleges facts which constitute all of the elements of assault or battery. If so, the officer should inquire whether the victim is willing to sign a statement containing those facts and, if necessary, advise the person that such a statement is one of the requirements before the officer can seek authorization to make an arrest without leaving the scene to obtain a warrant. The officer should also inquire about past abuse or other crimes to aid the officer in evaluating the dangerousness of the accused.

5.4.7. The responding officer should interview the accused

a fully as circumstances allow to inquire about the nature of the dispute.

5.4.8. 5.4.3. If the accused has been arrested prior to interview, the accused must be given Miranda warnings before being questioned. In order to avoid disputes over the admissability of statements made by the accused, the officer should advise the accused of the Miranda rights of the accused before asking the accused any questions if 1) the officer has arrested the accused pursuant to Sections 5.3.7, 6.3, or 7.2 of this Rule or 2) if the officer has said anything to the accused which could have led the accused to believe that the officer had placed any restraint on the liberty of the accused, or 3) if the officer has focused the investigation on the accused. 5.4.1. The officer should be alert to possible incriminating statements.

5.4.9. 5.4.3. If the accused has fled the scene, the officer should solicit information as to the possible whereabouts of the accused (place of employment, relatives, friends, etc.).

5.4.10. 5.4.4. If the dispatcher has not advised the officer of the existence of a protective order or conditions of release on bail, the officer should ask the victim whether there is such an order or such bail conditions and, if so, if the victim can produce a copy of the protective order or bail document and what county and court or magistrate the order or document was issued from. The officer should attempt to contact a 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. Law enforcement officers shall enforce all orders from the magistrate court of any court regardless of certification. Law enforcement officers shall enforce all valid protective orders (See Section 6.1.2 of this Rule) regardless of whether or not the accused has been served with the protective order. When law enforcement officers observe any violations of bail conditions the officer knows has been set in cases of crimes between family members or in situations of alleged child abuse, including the presence of the accused at the home of the victim in violation of such a bail condition, law enforcement officers shall arrest as authorized by Section 6.1.1 of this Rule. Law enforcement officers shall enforce all protective or similar type orders that have been entered by courts certified from outside the State of West Virginia if the terms and conditions of these orders are substantially similar to those which may be imposed by this state.

5.4.11. 5.4.5. The officer should interview any witnesses as fully and as soon as circumstances allow taking down names, addresses, and other relevant information. When interviewing witnesses the officer should determine whether the victim alleges facts which constitute all of the elements of assault or battery. If so, the officer should inquire whether the witness is willing to sign a statement containing those facts and, if necessary, advise the person that such a statement is one of the requirements before the officer can seek authorization to make an arrest without leaving the scene to obtain a warrant. The officer should also inquire about past abuse or other crimes to aid the officer in

evaluating the dangerousness of the accused.

5.4.12. 5.4.6. Children should be interviewed in a manner appropriate to the child's age. Signs of trauma and any apparent healing of wounds on the child should be noted by the officer.

5.4.13. 5.4.7. The officer should 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 officer should ensure that photographs are taken of visible injuries on the victim and of the crime scene.

5.4.14. 5.4.8. The officer should encourage the victim to seek medical attention for injuries that do not require emergency treatment at the scene. The officer should inquire about injuries of the victim that are concealed by clothing or otherwise not readily apparent. The officer should advise the victim to have photographs taken if injuries later appear.

5.4.15. 5.4.9. All physical evidence should be collected, noted in reports, and vouchered as in other criminal investigations.

**6. §149-3-6. The Arrest Decision; Arrest Authorization; Credible Corroborative Evidence; Factors not Considered; Confiscation of Weapons on Arrest.**

6.1. 6.2.3. The responding

officer is authorized to arrest and shall arrest the suspect accused:

6.1.1. 6.2.1. When the officer observes any violation of a bail condition, including the presence of the accused at the home of the victim in violation of such condition, set in cases of crimes between family members or in situations of alleged child abuse; or

6.1.2. 6.2.3. When the officer observes the violation of a valid protective order (e.g. presence at the residence or victim's job place) and the officer has actual knowledge that a valid protective order exists, unless the accused was not served with the order and did not otherwise have notice of the order and its contents. The officer shall arrest the suspect if the suspect's presence violates a protective order.

6.2. In circumstances other than those provided Section 6.1. of this Rule and if the officer has not already made an arrest at the scene pursuant to 5.3.7. the 6.1 The responding officer should arrest the assailant accused whenever arrest is authorized as set out in subdivision 6.3 of this Section. If the officer decides not to arrest, the officer must include in his the officer's report of the incident a detailed explanation of the reasons why an arrest was not made.

6.3. 6.2. Under current West Virginia law, arrest in circumstances other than those provided Section 6.1 of this Rule is authorized in the following circumstances:

6.3.1. 6.2.4. When a misdemeanor or felony a misdemeanor

not included among those in paragraphs 6.2.2 through 6.2.4 has been committed and the officer or another person obtains or has previously obtained an arrest warrant, or when a capias has been issued, or when a circuit judge has signed an attachment order.

6.3.2. ~~6.2.2.~~ When the officer observes the commission of a felony or a misdemeanor.

6.3.3. ~~6.2.1.~~ When the officer has probable cause to believe that the suspect has committed a felony.

6.3.4. When the officer:

6.3.4.1. Observes credible corroborative evidence that a misdemeanor assault or a battery has occurred by one family or household member against another family or household member;

6.3.4.2. Has obtained a signed statement from the alleged victim or witness to the alleged offense which has been voluntarily and knowingly executed and which sets forth facts constituting the essential elements of the alleged offense; and

6.3.4.3. Has received oral or telephonic authorization from a magistrate having jurisdiction over the alleged offense to arrest the person after the magistrate has been presented with information sufficient to satisfy the magistrate that probable cause exists to believe that the alleged offense was committed. Another officer acting at the request of the officer observing the credible corroborative evidence may request and receive the

authorization required by this provision. (Notwithstanding other definitions or provisions of this Rule, for the purpose of this subdivision and West Virginia Code §48-2A-14(a)(3) 1993, "another officer" includes a dispatcher if the dispatcher is employed by or otherwise controlled and trained by a law enforcement agency such that the officer determines that the dispatcher can reliably communicate necessary information between the magistrate and the arresting officer.)

6.3.5. If the accused has fled the scene, the authority to arrest pursuant to the immediately preceding subdivision of this section continues after the officer leaves the scene, if, at the time the officer has the opportunity to arrest, danger exists that would have allowed the officer to arrest an accused before leaving the scene pursuant to Section 7.2 of this Rule, but the officer should, at the officer's next reasonable opportunity, obtain a warrant.

6.3.6. ~~6.3.5.~~ Credible corroborative evidence. Communications between the officer and the magistrate pursuant to subdivision 6.3.4.3. of this Section regarding the telephonic or oral authorization for arrest shall constitute the emergency response of the magistrate to this domestic violence matter, but not an initial appearance in this criminal case, for the purposes of Rule 1 of the Administrative Rules for the Magistrate Courts of West Virginia. The accused may be detained in the same manner as a person under arrest for any other misdemeanor.

6.3.7. ~~6.3.6.~~ For the

purposes of this Rule the term "credible corroborative evidence" means evidence that is worthy of belief and corresponds with the allegations of one or more elements of the offense contained in the written statement. It includes, but is not limited to, the evidence listed below:

6.3.7.1. 6.3.6.1.

Condition of the alleged victim such as:

- one or more scratches, cuts, abrasions, swellings or obvious rednesses;
- missing hair;
- torn clothing or clothing in disarray;
- 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;
- observable breathlessness coupled with other physical exhaustion;
- observable, otherwise inappropriate, exaggerated startle response;
- observable, otherwise inappropriate hyperalertedness;
- observable, otherwise inappropriate numbed response behavior or incoherence;
- unconsciousness.

(Note that if physical condition is severe enough for the offense to constitute a felony, such as unlawful or malicious wounding, then arrest should be made using normal procedures for felony arrest based on probable cause. See 6.3.3.)

6.3.7.2. 6.3.6.2

Condition of accused:

- 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;

6.3.7.3. 6.3.6.3.

Condition of scene:

- Damaged premises or furnishings, including but not limited to locks, windows, doors, telephones;
- Alleged weapon present inconsistent normal storage of firearm or use of other potential weapon (such as kitchen knife in living room);
- Other unusual items significant to allegations in otherwise inappropriate places.

6.3.7.4. 6.3.6.4.

Other:

- Statements by accused admitting one or more elements of the offense;
- Threats similar to or consistent with alleged offense made by accused in presence of an officer;
- Audible evidence of disturbance heard by dispatcher or other governmental employee or agent receiving request for police assistance;
- Written statement by reliable person who actually saw or heard the alleged offense.

6.4. 6.3. The officer should not consider the following factors in making the arrest decision:

6.4.1. 6.3.1.

The marital status of the parties.

6.4.2. 6.3.2.

The ownership or tenancy rights of either party.

6.4.3. 6.3.3.

Verbal assurances that the violence will stop.

6.4.4. ~~6.3.4.~~ A claim by the accused that the victim provoked or perpetuated the violence.

6.4.5. ~~6.3.5.~~ 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).

6.4.6. ~~6.3.6.~~ The disposition of any previous police calls involving the same victim or accused.

6.4.7. ~~6.3.7.~~ Speculation that the arrest may not lead to a conviction.

6.4.8. ~~6.3.8.~~ The existence or not of a current protective order (except insofar as the violation of such an order might justify arrest).

6.4.9. ~~6.3.9.~~ The victim's emotional state.

6.4.10. ~~6.3.10.~~ Concern about reprisals against the victim.

6.4.11. ~~6.3.11.~~ Adverse financial consequences that might result from the arrest.

6.4.12. ~~6.3.12.~~ That the incident occurred in a private place.

6.4.13. ~~6.3.13.~~ The racial, cultural, social, political, or professional position, or sexual orientation of either the victim or the accused.

6.5. ~~6.4.~~ It is the officer's responsibility to decide whether an arrest should be made unless the officer is required to make an arrest. (See Section 6.1 of this Rule.). The officer, 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.

6.6. ~~6.5.~~ If the officer arrests for the commission of a crime, the officer should confiscate all weapons used or brandished in the commission of the crime, and such weapons should be held as evidence for prosecution; Provided that this section does not authorize a search of the premises unless a search warrant has been obtained or consent was given by the occupant of the premises.

**7. §149-3-7. Effectuating the Arrest; Arresting at Scene Before Leaving; "Every Practicable Effort" to Communicate with Magistrate.**

7.1. The responding officer should take the accused into custody as soon the officer is authorized, or learns that the officer is authorized, to make the arrest. ~~as a warrant for the arrest of the accused has been obtained or is outstanding.~~

7.2. Arresting "at scene" before leaving. When an officer observes credible corroborative evidence of a misdemeanor assault or battery (which the officer did not observe) by one family or household member against another family or household member, and when the officer is proceeding to make an arrest without a warrant for that offense on

the basis of a written statement, and telephonic or oral authorization from a magistrate:

7.2.1. If the officer has not yet obtained the signed statement of the victim or a witness as required as set out in Section 6.3.4.2. of this Rule, the officer should first obtain the statement, and

7.2.2. If the officer has not yet received oral or telephonic authorization from a magistrate to make the arrest, then the officer or another officer at the arresting officer's request, should make every practicable effort to obtain the authorization required by Section 6.3.4.3. of this Rule.

7.2.3. If the officer has obtained the signed statement, and if the officer has made every effort practicable effort to obtain authorization and has not been able to communicate with the magistrate, and if the officer determines that circumstances exist which convince the officer that a danger would exist to the health and safety of the alleged victim, another person at the scene, or the officer if the officer leaves the scene without arresting the accused:

7.2.3.1. The officer should make an "at scene" arrest of the accused as authorized by West Virginia Code §48-2A-14(b) and take the accused from the scene in custody without authorization from the magistrate. The officer should then follow Section 5.3.8.5 of this Rule which sets out the procedures to be followed when the accused is taken from the scene in custody before communicating with a magistrate.

7.2.3.2. If the officer subsequently communicates with the magistrate and the magistrate does not authorize continued arrest of the accused the officer should follow the procedures set out in Section 5.3.7 of this Rule.

7.2.4. If the officer has obtained the signed statement, and if the officer has made every effort practicable effort to obtain authorization and has not been able to communicate with the magistrate, and if the officer determines there is no substantial danger if the officer leaves the scene without arresting the accused:

7.2.4.1. The officer should follow the procedures set out in Sections 8 and 9 of this Rule; and

7.2.4.2.. Whether or not the victim accepts any other assistance from the officer pursuant to Sections 8 and 9 of this Rule, if the officer has determined that the accused should be arrested, then the officer should continue to make efforts to obtain telephone or oral authorization to make the arrest and return and make the arrest, or the officer should proceed to obtain a warrant at the officer's next reasonable opportunity to do so and return or arrange for another officer to return and make the arrest.

7.3. "Every practicable effort" defined.

7.3.1. There are places and times when the officer will not have the capability to communicate with the magistrate from the scene, or times when the officer has the capability and has attempted to do

so, but the magistrate has not responded after a reasonable number of attempts over a reasonable period of time in light of the circumstances at the scene and the other responsibilities of the officer. In some of these circumstances it would be dangerous to the victim or others at the scene if the officer left the scene without arresting the accused. This danger can exist even if the officer follows the procedures set out in Sections 8 and 9 of this Rule for cases when arrest is not authorized and for other assistance at the scene. In some of these circumstances it would be dangerous to the officer if the officer left the scene without arresting the accused, particularly if the officer will have to return to the scene to arrest the accused who could become angrier and who could get weapons during the officer's absence. For this reason this Rule authorizes officers to take accused persons from the scene in custody prior to authorization from a magistrate, but only in the limited circumstances when the officer has made "every practicable effort" to communicate with the magistrate to seek authorization as defined by this subdivision (7.3) and its further subdivisions.

7.3.2. If the accused has fled the scene, the authority to arrest pursuant to the immediately preceding subdivision of this section continues after the officer leaves the scene, if, at the time the officer has the opportunity to arrest, danger exists that would have allowed the officer to arrest an accused before leaving the scene pursuant to Section 7.2 of this Rule, but the officer should, at the officer's next reasonable opportunity, obtain a

warrant.

7.3.3. "Every practicable effort" includes efforts made by an officer who observed the corroborative evidence and who is making the arrest and another officer at the request of the arresting officer. (Notwithstanding other definitions or provisions of this Rule, for the purpose of this subdivision and West Virginia Code §48-2A-14(a)(3) 1993, "another law-enforcement officer" includes a dispatcher if the dispatcher is employed by or otherwise controlled and trained by a law enforcement agency such that the officer determines that the dispatcher can reliably communicate necessary information between the magistrate and the arresting officer.)

7.3.4. Using "every practicable effort" includes, but is not limited to, using the following efforts when they are practicable:

7.3.4.1. Calling the magistrate using a telephone at the scene.

7.3.4.2. Using an officer's radio at the scene patched into a telephone call to the magistrate.

7.3.4.3. Using an officer's radio at the scene to call the magistrate if the magistrate has access to radio communications through a dispatch site, the radio of another officer, or another radio accessible to the magistrate.

7.3.4.4. Using an officer's radio at the scene to call another officer who can call the magistrate on the phone or communicate with the magistrate in person at the

request of the arresting officer. The other officer may be a dispatcher. See subdivision 7.3.3 of this Section.

7.3.4.5. Using a telephone or an officer's radio near the scene A) if another officer at the request of the arresting officer can communicate with the magistrate by doing so, or B) the officer believes there will be no substantial increase in danger if the officer moves from the immediate scene to a nearby location because the suspect is already arrested and restrained or because of the other circumstances of the particular case.

7.3.4.6. Repeating an effort when the officer makes an effort that would have succeeded in reaching the magistrate, but the magistrate does not immediately respond to the officer's request for authorization: A) a reasonable number of times during a reasonable period of time in light of the circumstances of the particular case and the officer's other responsibilities or B) at a particular time if the officer was advised of a time when the magistrate would be available to respond and if the particular time is reasonably soon in light of the circumstances of the particular case and the officer's other responsibilities;

7.3.4.7. Having the magistrate come to the scene if it is practicable and the magistrate will come to the scene;

7.4. Communications between the officer and the magistrate regarding the telephonic or oral authorization for arrest is the emergency response of the magistrate to this domestic violence matter, but not an initial

appearance in this criminal case, for the purposes of Rule 1 of the Administrative Rules for the Magistrate Courts of West Virginia, and not the conduct of court activity which must be conducted at the courthouse. See Section 10 of this Rule for further procedures regarding initial appearances in magistrate court and processing the accused.

7.5. 7-1- 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 suspect has fled the scene, the officer should initiate procedures to pursue and apprehend the accused as promptly as possible; if the suspect has fled the scene, the officer should initiate procedures to pursue and to apprehend the suspect as promptly as possible if the suspect's presence in the vicinity represents a continuous threat to the safety of the victim and/or other members in the household. If a A warrant is necessary (e.g. the accused has entered another private residence), the officer should obtain and execute the warrant as soon as practicable.

7.6. 7-2- When the accused is a minor (under 18 years of age), the provisions of this rule ~~proposed~~ shall be fully applicable, except that arrest should be effectuated and the juvenile processed pursuant to the West Virginia Juvenile Offender Rehabilitation Act (W. Va. Code 49-5B-1 et seq.).

**8. §149-3-8. Procedure when Arrest is not Authorized or, if Authorized, is not Made.**

8.1. 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 detailed in the incident report)~~, the officer should:

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

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

8.1.3. Encourage the victim to contact the nearest available domestic violence program for information regarding counseling and other services available to victims of domestic violence.

8.1.4. Advise the victim or victims that upon request of the victim or victims the officer will provide transportation for, or facilitate transportation of the victim or victims to a shelter or the appropriate court where there is reasonable cause to believe that such victim or victims have suffered or are likely to suffer physical injury.

8.1.5. Provide transportation for or facilitate transportation of the victim or victims upon the request of such victim or victims to a shelter or the appropriate court where there is reasonable cause to believe that such victim or victims have suffered or are likely to suffer physical injury.

8.2. The officer should not

become involved in the disposition of personal property, ownership of which is in dispute. In the absence of ~~authority to arrest a warrant or probable cause to believe a crime has occurred~~, the officer should remain neutral and be concerned primarily with maintaining the peace and safety of those present.

9. §149-3-9. Other On-Scene Assistance to Victims and Dependents.

9.1. Whether or not an arrest is made, the responding officer should not leave the scene of the incident until the situation is under control and the likelihood of further violence has been eliminated. The officer should stand by while victims or others desiring to leave gather necessities for short-term absences from home, such as clothing, medication, and necessary documents.

9.2. Whether or not an arrest is made, the responding officer is required by W. Va. Code 48-2A-3a 9(b) 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 by providing the victim with a Victim's Rights Information Packet.

9.3. If an arrest is made or an arrest warrant obtained, the officer should:

9.3.1. 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;

9.3.2. Obtain from the victim information to be included in the arrest report indicating any special conditions of bail that should be requested at the preliminary arraignment initial appearance (i.e., places where the suspect should be specifically prohibited from appearing). This information would be in addition to a notation that an arrest was made pursuant to oral or telephonic authorization from a magistrate which automatically imposes conditions on bail. (See Section 10.4 of this Rule.)

9.4. Any police officer responding to an alleged incident of abuse shall inform the parties thereto of the availability of the possible remedies provided by the Prevention of Domestic Violence Act (48-2A-1 et. seq.) and that fees will not have to be paid until final resolution and will not have to be paid at all if the victim is unable to afford the fees. The police officer shall also inform the parties of and the possible applicability of the criminal laws of this State.

9.5. Any police officer responding to an alleged incident of abuse shall, in addition to providing the information required in section 9.4 above, provide transportation for or facilitate transportation of, the victim or victims, upon the request of such victim or victims, to a shelter or the magistrate court when there is reasonable cause to believe that such victim or victims have suffered or are likely to suffer physical injury.

9.6. Elder victims or physically dependent victims.

9.6.1. 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 elder or of a physically dependent person and the victim can no longer provide care (as, for example, when the victim is hospitalized), the responding officer should determine whether the elder 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 elder or physically dependent person is physically endangered and mentally alert, the officer should ask the elder or physically dependent person for the name of a relative or friend who can be contacted immediately to assist the elder or physically dependent person. The police officer shall facilitate transportation of the elder or physically dependent person to a relative or friend, if such a person can be found.

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

9.6.3. In addition to providing the notification required by other provisions of this protocol,

the officer should advise the elder or physically dependent person of the availability of protective services through Adult Protective Services.

9.7. Child victims and dependents.

9.7.1. When the victim of abuse is a minor child, the officer should arrest the ~~assault~~ accused if the officer observes the commission of a crime and should make a report to child protective services, as required by the Child Welfare Law. If the child is physically injured, the officer should facilitate the transportation of the child to the nearest hospital for treatment. The officer should provide the victim notification, as described herein, to an adult caretaker of the child who is not the perpetrator of abuse.

9.7.2. 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), the officer should determine whether there is a responsible relative who can care for the child and, if so, should contact that relative and await the relative's arrival. If no responsible relative is available, the officer 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.

10. §149-3-10. Processing the Accused; Initial Appearance Before Magistrate.

10.1. When the accused is arrested without a warrant for a misdemeanor as authorized by Section 6.3.4 (and Section 5.3.7) of this Rule:

10.1.1. 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.

10.1.2. An officer other than the officer making the arrest may appear at the initial appearance and swear to the warrant under the same conditions and using the same procedures as is appropriate and lawful in other cases.

10.1.3. At the initial appearance, the accused shall be supplied with a written complaint setting for the facts and circumstances supporting the charge which complies with the provisions of West Virginia Rule of Criminal Procedure 3 at the time of the appearance.

10.1.4. The officer swearing to the complaint for the warrant shall inform the magistrate that the accused was arrested for a misdemeanor assault or battery pursuant to oral or telephonic authorization by a magistrate so that required conditions of bond may be imposed as required by W. Va. Code §48-2A-14 (1993).

10.2. When arrest is made, except for an arrest without a warrant for a misdemeanor assault or battery not observed by the officer which

would be handled pursuant to subdivision 10.1 of this Section, the accused shall be taken before a magistrate for preliminary arraignment an initial appearance without unnecessary delay. Under no circumstances should the arresting officer release the defendant accused before the preliminary arraignment initial appearance.

10.3. 10.1. A person arrested  
If the arrest is for violation of a protective order or of a condition of bail, the accused should be charged with any crimes properly charged as a result of the incident in which the violation occurred.

10.4. 10.3. The arresting officer may inform the magistrate or court of any circumstances surrounding the arrest of the accused which would have an effect on conditions of bail. See also subdivision 10.1.4 of this Section. Provided, that the amount and conditions of bail is one of a judicial decision that rests are judicial decisions that rest solely with the magistrate or court. Relevant circumstances include, but are not limited to, evidence that the accused poses a threat or danger to the victim or another family or household member, whether a victim is a child, whether a victim is employed or attends school.

## 11. §149-3-11. Reporting.

11.1. A Domestic Violence Incident Report as required by W. Va. Code 48-2A-9 must be completed by the officer responding to any call covered by these rules and regulations.

### 11.2. Data collection.

#### 11.2.1. All written

reports on the same person should be kept together or cross-referenced so that repeat domestic violence can be monitored for at least a two year period of time.

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

11.2.3. To the extent possible, the domestic violence tracking report should be accessible to dispatchers and police officer.

~~§149-3-12 Registration . . . See 48-2A-12 (1992)~~