



STATE OF WEST VIRGINIA

GOVERNOR'S OFFICE

OF

COMMUNITY AND INDUSTRIAL DEVELOPMENT

Charleston, West Virginia 25305

GASTON CAPERTON
GOVERNOR

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.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Protocol for Law Enforcement Response to Domestic Violence

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.

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: June 30, 1993

Signature of Agency Head or Authorized Representative

James M. Allert

DATE: June 30, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Governors Committee on Crime, Delinquency and Correction

EMERGENCY RULE TITLE: Protocol for Law Enforcement Response to Domestic Violence

1. Date of Filing _____

2. Statutory authority for promulgating emergency rule:

48-2A-9

3. Date of filing of proposed legislative rule: _____

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule?

Amends current Legislative Rule

5. Has the same or similar emergency rule previously been filed and expired?

No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

The current protocol in the code of state regulations now conflicts with Chapter 48, Article 2A, Section 1 of the West Virginia Code which was amended by the 1992 and 1993 legislature. Law enforcement officers who rely on the current code of state regulations may act in violation of the statute and become liable for such actions. Examples of changes are the definition of family violence or abuse, the definition of family or household members, the handling of protective orders, temporary protective orders and orders issued in other states which are contained in the 1992 legislative changes. House Bill 2427, which was passed by the 1993 legislature, enables an officer to arrest the accused with probable cause if conditions outlined in the Law are met. The revised protocol outlines procedures the officer will follow to effect an arrest. In addition, they contain the procedures officers should use when arriving at a domestic violence scene to minimize danger to the responding officer. The Family Protection Act of 1992, passage of House Bill 2427 and the Domestic Violence Protocol as amended directly affect law enforcements response to and treatment of incidents of domestic violence.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

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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

of Public Safety West Virginia State Police. Nothing in these rules should be construed to extend the authority of any law enforcement officer beyond the officer's statutory jurisdiction.

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 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. 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."~~

~~3.1.3 "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. A protective order is in effect for as long as the order says it is in effect except:

3.4.1. 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. The

temporary or final order was entered in a divorce, separate maintenance or annulment action between the same parties, and

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

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

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

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

3.6. 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, including a family or household member who is a child, with any 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, 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 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. 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.

~~5.1.3. 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. Approach the scene inconspicuously. Do not use sirens or lights in the immediate area of the scene of the incident.

~~5.1.4. The officer otherwise should employ standard precautionary measures in approaching 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, set in a crime charged against a family or household member, including a family or household member who is a child, 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 6.3.4.2 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. 2 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 Section 8, "Procedure when Arrest is not Authorized or, if Authorized, is not Made," and Section 9, "Other On-Scene Assistance to Victims and Dependents," 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 Section 8, "Procedure when Arrest is not Authorized or, if Authorized, is not Made," and Section 9, "Other On-Scene Assistance to Victims and Dependents," 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. 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 manner 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.

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.

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. ~~5.4.5.~~ The officer should interview the victim and/or any witnesses as fully and as soon as circumstances allow taking down names, addresses, and other relevant information. ~~If witnesses provide information about prior incidents, the officer should document such incidents to establish a pattern.~~ When interviewing the victim and/or any witnesses the officer should determine whether the victim and/or any witnesses alleges facts which constitute all of the elements of assault or battery. If so, the officer should inquire whether the victim and/or any 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.

5.4.7. The responding officer should interview the accused a fully as circumstances allow to inquire about the nature of the dispute. ~~5.4.1.~~ The officer should be alert to possible incriminating statements.

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.

5.4.9. 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 set in a crime against a family or household member, including a family or household member who is a child, 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 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 officer should follow the arrest authorization provisions of Section 6 of this Rule. Where the suspect has not been served and has not had actual notice of the order,

if the officer has a copy to serve upon the suspect, the copy should be served. If the officer does not have a copy to serve, then the officer should give the suspect actual notice of the provisions of the order by stating the provisions of the order to the suspect. If the accused, after having been served with, or given actual notice of, the order then refuses to comply with the order, the officer should follow the arrest authorization provisions in Section 6 of this Rule. When law enforcement officers observe any violations of bail condition the officer knows has been set in cases of crimes between family or household members including a family or household members who are children, law enforcement officers shall arrest for violations of such bail conditions including the presence of the accused at the home of the victim as authorized by Section 6.1.1 of this Rule. Law enforcement officers shall enforce all valid protective orders regardless of whether or not the accused has been served with the protective order. 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. 5.4.6. 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.

5.4.12. 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.

5.4.13. 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.

5.4.14. 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. 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, including family or household members who are children; 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 he 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.~~ 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.~~ Credible corroborative evidence. 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.

If the 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. 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. 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 inconsistent with normal storage 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. 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 as 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. 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 next.

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 reasonable 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 reasonable 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 5.3.8.3 of this Rule.

7.2.4. If the officer has observed credible corroborative evidence, and if the officer has obtained the signed statement, and if the officer has made every effort reasonable 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 Section 8, "Procedure when Arrest is not Authorized or, if Authorized, is not Made," and Section 9, "Other On-Scene Assistance to Victims and Dependents," of this Rule; and

7.2.4.2. Whether or not the victim accepts any other assistance from the officer pursuant to Section 8, "Procedure when Arrest is not Authorized or, if Authorized is not Made," and Section 9, "Other On-Scene Assistance to Victims and Dependents," 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. "Reasonable 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 reasonable 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. "Reasonable effort" includes efforts made the by officer who observed the corroborative evidence and who is making the arrest and/or another officer at the request of the arresting officer.

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

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.

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 an officer who is a dispatcher.

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.

7.4. 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. 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 warrant is necessary (e.g. the accused has entered another private residence), the officer should obtain and execute the warrant as soon as practical.

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 the 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 immediate 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 for a battery against a family or household member,

including a family or household member who is a child, 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 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 ~~assailant~~ 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 criminal complaint 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. This complaint must set forth the facts and circumstances supporting the charge. The complaint must comply with the provisions of West Virginia Rule of Criminal Procedure.

10.1.4. The officer swearing to the complaint for the warrant shall inform the magistrate that the accused was arrested for a misdemeanor 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(i) (1993).

10.2. When an 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)~~

RESPONSE OF GOVERNOR'S COMMITTEE
TO PUBLIC COMMENTS ON
AMENDMENTS TO THE RULE ON
POLICE RESPONSE TO DOMESTIC VIOLENCE

August 16, 1993

General

- One comment stated there may be a procedural flaw because an advisory committee was not used to propose these revisions.

The original enactment of *West Virginia Code* §48-2A-9(g) required an *advisory committee* "to assist" in the development of the original Rules which the *Governor's Committee on Crime, Delinquency and Correction* was "to develop and promulgate." The last sentence of that section required a "committee" to meet at least annually to review the rules and propose revisions. It is unclear whether the use of the word "committee" in the last sentence referred to the advisory committee or the Governor's Committee. The Governor's Committee takes the position that this last sentence is the only authorization for recurring review. Since it would be the "Governor's Committee" which would have to actually propose rules, the term "committee" in the last sentence refers to the Governor's Committee. An advisory committee is therefore probably not a requirement. However, because it is the better practice, and to avoid any argument that the rules were not properly promulgated, the Governor's Committee has convened an advisory committee which will be on going. This advisory committee reviewed the public comments on the current rule. This advisory committee will, in the future, review any proposed amendments to these rules before submission to the Governor's Committee who will then propose them to the Legislature.

Section 3.1¹

- One commentor pointed out that the reference to the authority of campus "appointed security officers" could lead to a misunderstanding about the scope of authority of such officers.

To avoid this misunderstanding with regard to the scope of authority of *any* law enforcement officer, a change was made. A new sentence was added to the end of 3.1 to read, "Nothing in these rules should be construed to extend the authority of any law enforcement officer beyond that officer's statutory jurisdiction."

¹ Section numbers refer to the number on the draft published for comment. These will usually, but not always, be the same as on the version submitted to the Legislative Rulemaking Review Committee.

Section 4.2.11

- A comment was made that there is authority for arrest for violations of bail conditions contained in *West Virginia Code* §62-1C-17(c) for family and household members, but the Rule also appears to authorize arrest for violations of bail set under *West Virginia Code* §62-1C-17(a) for child abuse, not necessarily of a family or household member, which has no arrest authority.

A change was made to delete language that was parallel to the language in §17(a). New language was inserted to point out that 17(c) grants authority to arrest for observation of a violation of a condition of bail even where no domestic violence petition was brought if the abused child and the abuser were family or household members. See 17c(d).

The same change was made for similar references pointed out in §§4.5, 5.3.6, 5.4.10 and 6.1.1 which were also noted in the comment. 10.3, which was noted in the comment period, but did not need to be changed.

Section 4.5, See "Section 4.2.11."

Section 5.3.2 and others

- A comment was made that replacing the term "assailant" with the term "accused" was appropriate, but after additional review the most proper expression would have been "suspect."

The terms "assailant," "accused" and "suspect" were all previously used in the Rule. This was confusing. This year's proposed amendments reduced the terms used from three to two. So many other changes were made this year that it was thought the additional changes required for the Rule to use only one term might lead to confusion regarding the more important changes that were made. A change will probably be made the next time the Rule needs modified.

Section 5.3.6, See "Section 6.2.11."

Section 5.3.7

- A comment was made that the reference to §5.3.4.3 is erroneous.

The reference to 5.3.4.3 was changed to a reference to 6.3.4.2.

Section 5.3.8.3

- A comment was made that to sections 8 and 9 of the Rule would be more helpful if the titles of the sections was also set out.

This change was made.

Section 5.3.8.5

- A comment was made that this provision limiting custody of the accused without magistrate authorization until the next time the on call magistrate must appear was an excessive allowance of time in custody.

This provision, and the rule generally, set out in some detail the *immediate* duties that the officer should undertake to try to get authorization from a magistrate. The limitation referred to was seen as a time cap after which there was no excuse for retaining custody without magistrate authorization. This cap was therefore seen as an extra safeguard rather than an excess. It is therefore highly unlikely that this cap would come into play. It should be noted that the effective time allowed is one-sixth allowed that by a United States Supreme Court case.

- A comment was made that this section does not state that an officer who is not the actual arresting officer can appear before the magistrate and swear to the complaint for the warrant, although that instruction does appear elsewhere.

After further changes were made in this section pursuant to other comments, it was determined that no change was necessary.

- A comment was made that the term "warrant" should be replaced by the term "manner."

This change was made.

Section 5.4.2

- A comment was made that this section did not make clear that the written statement has to be obtained by the officer before the officer calls the magistrate.

The comment is correct. However, this is only the investigatory section, not the section that tells the officer what to do in what order. However, to make sure there is no confusion and to shorten this section and focus it on its investigatory nature, the second sentence, which was only explanatory, was deleted.

Section 5.4.6, See "Section 5.4.11"

Section 5.4.8

- A comment was made that the change to the section referring to the reading of Miranda rights made it too inclusive.

The pre-existing language in that section was clearly too limited to meet constitutional standards. The situations encompassed in the new explanations may include situations in which there is some authority that Miranda rights are not required to be given before the statement of the accused can be used. However, it should be noted that the Rule does not purport to state when courts will suppress a statement because Miranda rights were not given. The Rule states a suggestion to officers to avoid any disputes over whether Miranda rights should have been given.

Section 5.4.10

- A comment was made that this section had not been changed sufficiently to be consistent with the changes made in §6.1.2. §6.1.2 was changed because the previous language was unconstitutional. It would be unconstitutional for the officer to make an arrest of someone for violating a protective order (unless the act which was a violation of the protective order was itself a separate crime) if the suspect had no knowledge of the order.

A change was made. The fourth and fifth sentences were deleted and four sentences inserted. Those sentences read, "Where the accused has been served with the protective order or has actual notice of the protective order, the the officer should follow the arrest authorization provisions of Section 6 of this Rule. Where the suspect has not been served and has not had actual notice of the order, if the officer has a copy to serve upon the suspect, the copy should be served. If the officer does not have a copy to serve, then the officer should give the suspect actual notice of the provisions of the order by stating the provisions of the order to the suspect. If the accused, after having been served with, or given actual notice of, the order then refuses to comply with the order, the officer should follow the arrest authorization provisions in Section 6 of this Rule."

- A comment regarding spelling was made.

The spelling of the word "been" was correct.

- See "Section 4.2.11."

Section 5.4.11

- A comment was made that the new language uses the term "victim" instead of the term "witness."

- Another comment was made that Section 5.4.11 and Section 5.4.6 are identical except for those two terms, and it might be clearer to combine them.

A change was made. Section 5.4.11 was changed to apply to a victim or a witness. The language of Section 5.4.6 was deleted and the revised language of Section 5.4.11 was moved over to 5.4.6. All the language of 5.4.11 having been moved, it was eliminated and the following sections renumbered.

Section 6.1.1, See "Section 4.2.11."

Section 6.1.2

- A comment was made that this section *mandates* arrest where an officer observes a violation of a valid domestic violence protective order, and that this requirement is contrary to *West Virginia Code* §48-2A-10(c) which authorizes but does not require arrest.

The language in question does appear to conflict with the Code which authorizes but does not mandate arrest. However the language in question was authorized by the 1992 legislative authorization of the original rule. This issue was a major policy decision. Since the legislature has already spoken on this, it was thought to be beyond the purview of this modification by the Governor's Committee to make the change suggested by the comment.

Section 6.3.4.3

- A comment was made that the Rule exceeded statutory authority when it authorized dispatchers to convey information to magistrates in order for officers to get magistrate authorization for arrest.

- Another comment emphasized the extreme importance to police officers of the ability to use dispatchers.

From the personal knowledge of the advisory committee reviewing the public comment, it was the intent of the legislature to include the use of dispatchers. The inability of officers to use non-officer dispatchers to communicate with magistrates would generally limit the ability of officers to make an arrest where there is no telephone at the scene. This is particularly true where the officer cannot make a determination that there is immediate danger. On the other hand, the language of the statute clearly uses the term "officer." There are serious liability questions if a dispatcher would be used where the statutory term is relatively clear. Finally, the Supreme Court Administrator's office has given indications that they will instruct magistrates to rely on the language of the statute.

A change was made. Provisions which authorized the use of dispatchers who are not officers is moved, although the legislature is invited to solve this problem with a clean-up bill or an amendment to this Rule which would satisfy the judiciary.

Section 6.3.5

- A comment that there were insufficient limitations on the authority to make "hot pursuit" arrest before a warrant was obtained (where the officer had corroborative evidence, a written statement, and telephone authorization from a magistrate).

The Rule uses the term "reasonable opportunity" to obtain a warrant. Every more concrete language possibility stated in days or hours, etc., created an unacceptable scenario in one of the many circumstances that exist in West Virginia; rural v. urban v. city v. county v. state officers, etc. If the officer already has oral authorization from a magistrate, it is thought that the "reasonable opportunity" was enough of a limitation. No change was made.

Section 6.3.6

- A comment was made that the heading did not jibe with the contents of this section.

The heading was misplaced. It was moved to the very next section, Section 6.3.7.

Section 6.3.7.1

- A comment was made that parenthetical noted was merely instructive and unnecessary.

It was determined that the statement is not necessary, but it is helpful in the context of that subdivision of the Rule. It was changed only by deleting the parentheses and making it a sentence standing on its own.

Section 7.1

- A comment was made that the word "as" was left out.

The term was added.

Section 7.2

- A comment was made that the title was misleading.

It was agreed that the title was misleading by its brevity. No substitute title could be thought of that was short enough to be called a title. The title was changed by deleting it.

Section 7.2.1 and 7.2.2

- A comment was made that it was not clear that the witness's statement had to be signed before the officer called the magistrate.

A change was made by adding "next" to the end of Section 7.2.1.

Section 7.2.3

- A comment was made that the first use of the word "effort" should be eliminated.

The term was eliminated.

Section 7.2.4.1, See Section 5.3.8.3

Section 7.2.4 and 7.2.4.2

- A comment was made that the necessity of corroborative evidence was not in this language.

In 7.2.4 the language was included.

In 7.2.4.2, the reference in the language was a general reference to all requirements and it was not found that necessary to repeat one particular element here.

Section 7.3.2

Section 7.3.3, See Section 6.3.4.3

- A comment was made that the word "and" in the phrase "the arrest and another officer at the request" should be change to "and/or."

The change was made.

- See Section 6.3.4.3

Section 7.3.4, See Section 6.3.4.3

Section 7.3.4.3

- A comment was made that the language was confusing.

The last three lines of the section together with the last word of the line before, were deleted.

- A comment was also made that it might be improper for a magistrate to go to the police dispatcher's office to make an authorization.

A recent change made by the Supreme Court to Rule 1 of the Administrative Rules of Magistrate Courts of West Virginia does allow magistrates to act from "any location" in response to "telephonic" requests for warrantless arrest authorization. The theory for allowing magistrates to act from any location in response to a telephonic request for authorization would seem to support allowing the magistrate to go to a dispatcher's office to do it over the radio. However there was some concern that it could be an appearance impropriety for the magistrate conducting court business at a police equipment location. The Rule was changed by deleting this authorization.

Section 7.3.4.4.

See "Section 6.3.4.3."

Last sentence rewritten

Section 7.3.4.7

- A comment was made that magistrates would violate their ethical and legal duty to remain neutral and detached if they went to the scene.

The Rule was changed by deleting this provision.

Section 7.4

- A comment was made that the Rule attempts to govern official court business.

The Rule does not attempt to govern official court business. It attempts to give an explanation of the requirements of court rules to officers to know what to expect when appearing before magistrates and judges. However, to avoid the appearance of violating the separation of powers doctrine, the last fourteen words of the sentence were deleted which referred to the conduct of court activity.

Section 7.9.2

- A comment was made that the "victim's rights information packet" needs updated.

It was agreed that this packet needs updated. It is beyond the scope of the present proceedings. A message will be given to the appropriate persons that we need to come up with a new packet.

Section 9.1

- A comment was made that there should be more articulation of why an officer would not take further action.

Other changes were made reduced the need for making this change.

The term "further" was changed to "immediate."

Section 9.3.2

- A comment was made that automatic imposition and conditions of bail only applies under the statute where a battery is alleged.

It is agreed that this is an error in Section 9.3.2.

The words "for a battery" were added. In Section 10.1.4 the word "assault" was taken out.

Section 9.4

- A comment was made that it is not the duty on law enforcement officers to inform alleged victims of the court fees regarding domestic violence.

A change was made deleting the imposition of this duty of law enforcement officers.

Section 10.1.2

- A comment was made that the officer swears to a "complaint" for a warrant and not the "warrant."

This comment is correct. The term "warrant" was changed to "complaint." To add clarity, the term "criminal" was inserted before the term "complaint" so there would be no confusion with domestic violence protective petitions or civil complaints.

- A comment was made that officers want to be assured that it was permissible for an officer, other than the actual arresting officer, to swear to the complaint.

It was determined that with other changes that were made, this section is satisfactory.

Section 10.1.3

- A comment was made criticizing the reference to the Rules of Criminal Procedure.

responsibilities as deputy sheriff's. The legislature is invited to change the term "appointed security officer" since such a designation could confuse those officers with nightwatchmen, etc.

Section 10.4

- A comment was made that this section referred to another section which is not correct.

The incorrect section to which reference was made was corrected.



Department of Public Safety
(West Virginia State Police)
725 Jefferson Road
South Charleston, West Virginia 25309-1698

Gaston Caperton
Governor

Colonel Thomas L. Kirk
Superintendent

July 28, 1993

Governor's Committee on Crime, Delinquency and Correction
1204 Kanawha Boulevard East
Charleston WV 25301

Dear Committee Members:

The West Virginia State Police has received the most recent draft of "Protocol, Law Enforcement's Response to Domestic Violence" and have included in this correspondence our responses to this document. Some items are purely housekeeping (typographical errors or misspellings). Other items we've commented upon may exceed the scope of these Rules and Regulations, but need to be covered in their proper realm, as they are most relevant to an officer's response to a domestic incident.

Section 3.1 We feel that it is indeed important to include collegiate security officers and campus police to ensure an effective response, but that it would also be beneficial to include the limitations on their enforcement duties and the premises that define their jurisdiction. Adding the wording from the code: "an appointed security officer of a state, university or college while on property owned or rented by the institution" might accomplish this.

Section 5.3.2 (excluding Section 10) The term "accused" is more appropriate than the term "assailant", but after additional review, we feel the most proper expression would be "suspect".

Section 5.3.7 There is a reference to Section 5.3.4.3. This section doesn't exist. Would the correct reference be 6.3.4.2?

Section 5.3.8.5 This section does not state if it has to be the actual arresting officer present at the time the magistrate makes his/her appearance. This appears to be covered in Section 6.1.2, and in Section 10 but it needs to be addressed in this section. It would be helpful to an officer that might get off shift at 5:00 am to have someone else, another member of the department or even the bailiff, appear at 10:00 am when the magistrate first comes on duty. It would be impractical as well as inconvenient for the arresting officer to appear at this particular time.

Also, it would be helpful to briefly explain to what Sections 8 & 9 pertain, such as: Section 8: Procedure When Arrest is Not Authorized or If Authorized is Not Made and Section 9: Other On-Scene Assistance to Victims and Dependents.

The wording "the accused may be detained in the same warrant as a person under arrest" should be changed to "the accused may be detained in the same manner as a person under arrest."

Section 5.4.8 Although we realize that it is the suspect's "presumption" that he/she has been placed under restraint or have had their civil liberties curtailed to necessitate Miranda warnings, we feel that #2 is too broad and limits the officer's ability to control and properly assess the situation. A statement by an officer to "take a seat" could easily be construed as an "arrest".

Section 5.4.10 The word "been" is misspelled.

Section 6.1.2 This section mandates the arrest of the suspect if an officer observes the violation of a valid protective order, contrary to §48-2A-10(c) which leaves the arrest decision up to the officer's discretion. We realize that there are two strong arguments on this issue; one being that the Rules and Regulations may not exceed the provisions set in the state code. If one follows this line of reasoning, the Rules and Regulations do not hold true and Chapter 48 determines the correct response. The opposing argument is that since these Rules and Regulations are actually voted upon by our legislature, then the directions stated in the protocol have the same strength as Chapter 48 and the mandated arrest is required by an officer. We feel that it is imperative that the arguments be put to rest and a final decision be reached. The discrepancy between the Code and the Rules and Regulations poses a serious liability risk for the officer that fails to make an arrest. Our agency also feels that mandated arrest undermines a pro-arrest policy for law enforcement. We agree that arrest is the preferred and the most effective method of handling domestic calls, but we believe that the final decision should rest with the responding officer.

Section 7.1 The phrase should be "as soon as".

Section 7.2.3 The first use of the word "effort" in the phrase "every effort practicable effort" should be eliminated.

Section 7.2.3.2 The reference to 5.3.7 is incorrect as it does not describe the procedure for release of the suspect when an arrest has not been authorized. Should this be 5.3.8.3?

Section 7.2.4.1 Again, it would be helpful to briefly explain to what Sections 8 and 9 pertain, such as: Section 8: Procedure When Arrest Is Not Authorized or If Authorized Is Not Made and Section 9: Other On-Scene Assistance to Victims and Dependents.

Section 7.3.2 The word "pursuant" is misspelled.

Section 7.3.3 We wish to emphasize the need for the dispatchers to be included in this protocol. Our Division relies heavily on our dispatchers to relay messages. They would be the person communicating directly with the magistrate. If the dispatcher was not allowed to intervene in the radio communication between the officer and the magistrate, the ability to make an arrest would be seriously impaired, if not eliminated!

Also, in the beginning of 7.3.3, we recommend that the phrase "the arrest and another officer at the request" be changed to "the arrest and/or another officer at the request".

Section 9.1 It would be beneficial to articulate why an officer would not take action or would not be required to stay at the scene. Our Division has serious reservations on this section, the way it is currently written, we would not be able to properly follow this provision and ensure the safety of the parties involved.

Section 9.4 We agree with the Supreme Court's Administrative counsel in that it is not the statutory duty of an officer to inform the victim about the fees associated with the filing of protective orders. Although 48-2A-4(f) states that fees are not to be charged until final resolution, it does not instruct officers to inform the parties of such. Although we agree it is within the role of law enforcement to advise of the availability of possible remedies under the Prevention of Domestic Violence Act, we feel informing the disputants about payment and fee assessment is not a function that should be performed by law enforcement.

Section 10.1.2 We wish to be assured that it is permissible for an officer, other than the actual arresting officer, to swear to the complaint.


Section 10.1.3 Please explain to what Rule 3 of the Criminal Procedure pertains. Most law enforcement officers are not familiar with the Rules and even our references (ex: West Virginia Criminal and Traffic Law Manual) do not include them.

Section 10.1.4 Is it possible for a uniform mechanism to be established for the officer swearing to the complaint to be aware of the information that is to be imparted to the magistrate? Perhaps it can be included in the paperwork utilized by the arresting officer when the accused was placed in jail.

Section 10.2 The word "an" should be added so that it will appear as "When an arrest is made".

We realize that it is a very imposing undertaking to update the protocol to reflect the change in West Virginia's Domestic Violence law. HB 2427 is very unique and the situations that will be faced by law enforcement are difficult to foresee. We appreciate the effort to address the possible situations and hope our comments will be helpful in completing this update.

Sincerely,



LT COLONEL G. N. GRIFFITH
DEPUTY SUPERINTENDENT

GMG:SGM/skc

cc: file

MAC



FAIRMONT
STATE COLLEGE

July 14, 1993

Office of Campus Security

Governor's Committee on Crime
James M. Albert, Executive Director
1204 Kanawha Boulevard, East
Charleston, WV 25301

Dear Mr. Albert:

After review of Title 149, Legislative Rule, Series 3, "Police Response to Domestic Violence", noted in 5.3.7., a reference to 5.3.4.3. was not provided.

Please be assured that our department does and will continue to enforce the law, as prescribed, to the best of our abilities in a manner which provides for the safety of our officers and the general public.

By the powers granted senior administrators of institutions, WV Code 18B-4-2., our institution has adopted the position that Security Police will be unarmed.

My concern is for the safety of the officers charged with enforcing the laws. Recent events, as that at Weber State University, demonstrate the need for effective protection of the Police Officers and the public they are charged with protecting.

Your thoughts on this position would be greatly received.

Sincerely,

Lorin Elder, Chief
Fairmont State Security Police

LE/bm

COUNTY OF CABELL
STATE OF WEST VIRGINIA
PROSECUTING ATTORNEY

TELEPHONE (606) 625-0953

CHRISTOPHER D. CHILES
PROSECUTING ATTORNEY

SUITE 350
CABELL COUNTY COURTHOUSE
HUNTINGTON, WEST VIRGINIA 25701

July 28, 1993

Donald Davidson
Criminal Justice and Highway Safety
1204 Kanawha Blvd., East
Charleston, WV 25301

VIA FACSIMILE

RE: Legislative Rules,
Police Response to Domestic Violence

Dear Mr. Davidson:

By way of public comment on the proposed version of the Legislative Rules concerning the Police Response to Domestic Violence, please consider the following as a public comment:

1. 5.3.8.1 provides a statement of the purpose of an arrest pursuant to 5.3.7 which I do not believe is contained in W.Va. Code § 48-2A-14. In addition, it refers to an officer "generally" only having authority "to keep the accused in custody at the scene." This language may be confusing to officers, who need specific guidance. I am not sure this language is required by statute or helpful to officers and would suggest that it could be eliminated.
2. 5.3.8.3 requires officers to "unarrest" an "accused" upon denial of authorization for an arrest by a magistrate. While I do not argue that the language is inaccurate, I believe the Rules should give additional guidance to officers and can limit the circumstances when that procedure would become necessary.
3. 5.3.8.5 requires officers to make repeated attempts to contact a magistrate, even after a warrantless arrest has been effectuated. I do not believe this is required by W.Va. Code § 49-2A-14. Such repeated attempts may prove futile and unreasonable burden officers transporting arrested individuals. The last sentence provides that "The accused may be detained in the same warrant as a person under arrest for any other misdemeanor." 5.3.8 refers to an "arrest" of the accused. Therefore, the use of the word "detained" in this section may be confusing. In addition, use of the word "warrant" may be confusing.
4. 5.4.6 and 5.4.11 appear to have identical language. Perhaps one could be eliminated.


Donald Davidson
July 28, 1993
Page 2

5. 6.3.4.3 defines dispatchers as law enforcement officers in certain circumstances. I doubt that magistrates will honor this and do not believe this is authorized by W.Va. Code § 48-2A-14, unless the dispatcher is a law enforcement officer.
6. 6.3.6 contains information which does not seem connected with its heading. "Credible, corroborative evidence."
7. 7.2.2 requires an officer who has made a warrantless arrest without magistrate authorization to "make every practicable effort" to obtain magistrate authorization to arrest. I am concerned that this language, without clarification, may be confusing. 7.3.3 defines "every practicable effort"; concluding with the statement that officers may only remove an arrested individual from the scene without magistrate authorization only in limited circumstances. I do not believe the statute requires this.
8. 7.3.4.4 states that "~~The other officer may be a dispatcher.~~" I do not believe this is authorized by the statute.
9. 7.3.4.6 appears to further define "make every practicable effort", but I find it confusing and unworkable.
10. 7.3.4.7 contemplates a magistrate coming to the scene of a domestic violence call. I would hesitate to suggest such a visit as I believe it could be beyond the scope of a magistrate's duties, and would become the grounds for a motion for recusal of the magistrate.

I have spoken with Jamie Albert concerning my dual role as commenter and evaluator of comments as a member of the Advisory Committee to assist in evaluating comments and revising the rules. We have tentatively agreed that I may function in both capacities. If you find any difficulty in my assuming both roles, please notify me and I will resign my position on the Advisory Committee.

Thank you for your cooperation and assistance.

Very truly yours,


Margaret Phipps Brown
Assistant Prosecuting Attorney

MPB:pb

SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

TED PHILYAW
ADMINISTRATIVE DIRECTOR



ADMINISTRATIVE OFFICE
BUILDING 1, ROOM E-400
1900 KANAWHA BOULEVARD, E.
CHARLESTON, WV 25305-0830
304/558-0145

21 July 1993

Governor's Committee on Crime,
Delinquency and Correction
1204 Kanawha Blvd., East
Charleston, West Virginia 25301

Attention: Protocol for Law Enforcement
Response to Domestic Violence

Re: Comments on Rules as Filed 29 June 1993, Title 149, Series 3

Dear Committee Members:

In a constructive effort to foster the impartial application of statutory law and the administration of justice, we offer the comments below from the detached perspective of addressing the rules on their merits.

As a threshold matter, we read W.Va. Code §48-2A-9(g) as requiring the Governor's Committee annually to convene an advisory committee "to review the rules and to propose revisions as a result of changes in law or policy." Since the Governor's Committee did not have the benefit of an advisory committee's input before adopting the rules as filed, such statutory procedural defect brings the validity of these rules into question.

In any event, concerns about specific provisions of the rules call for discussion.

- 3.1 Security officers appointed by a state university or college have authority to act as law-enforcement officers within the limitations set forth in W. Va. Code §18B-4-5. To include this group generally as law-enforcement is misleading and could lead to a misunderstanding in applying the provisions of the rule. For example, a deputy sheriff responding to a domestic violence situation in Cabell County could not automatically call upon a security officer appointed by Marshall University to request that arrest authorization from a magistrate be obtained.

- 4.2.11. W. Va. Code §62-1C-17c deals with bail in cases of crimes between family or household members. The authority to arrest for violation of bail conditions found in subsection (d) of this statute is limited to cases of crimes between family or household members. Inserting language of "assault or other offense against a child", which is contained in W. Va. Code §62-1C-17a and does not include arrest authority, is unnecessary and could confuse the issue of when arrest is authorized. The general reference to release on bail on a charge of a crime against a family or household member when a condition of bail requires that no contact be made with the victim would include a child who is a family or household member without confusing the two statutory provisions.
- 4.5 Only the conditions of bail contained in §62-1C-17c are those for which an arrest is authorized; other references to arrest authority involving violations of bail conditions which would need clarified include: 5.3.6.; 5.4.10.; 6.1.1.; 10.3.
- 5.3.7. Reference is made to a non-existent 5.3.4.3.; the appropriate section appears to be 5.3.7.3.
- 5.3.8.5. Under this provision, an accused may be kept "in custody" for 12 hours without receiving authorization for an arrest; this is clearly excessive in light of the statute. It also seems unlikely anywhere in this state for it to take 12 hours for a law enforcement officer to reach a phone or get out of a radio "dead space". If the Legislature intended that arrests in such situations were to be treated "like any other arrest", provision would have been made simply for warrantless arrests rather than requiring that such arrests be authorized by a magistrate [same language is repeated in 6.3.6.]. The prior authorization requirement makes it incongruent for a magistrate to authorize the arrest after the person is brought before him or her. Given the statutory language, the Court by rule (effective September 1, 1993) has required on-call magistrates to take such calls for authorization at their homes; if the situation occurs during office hours, a magistrate could be contacted directly at the magistrate's office.
- 5.4.2. The written statement has to be gotten from the witness before calling the magistrate as noted in 5.4.6.
- 5.4.10. The provision in this section dealing with service of a protective order on the perpetrator conflicts with 6.1.2. If the officer knows that a protective order has not been served, it would be inappropriate to arrest for a violation of the order. However, if completion of service is not clear, an arrest may be proper and the accused could raise the issue of service or notice as a defense at the proper time before the court.

- 5.4.11. Reference is made to whether a "victim" alleges facts constituting assault or battery. "Victim" should be replaced with "witness".
- 6.3.4.3. [Also see 7.3.3. and 7.3.4.4.] There is no statutory authority for dispatchers to serve as law enforcement officers in any capacity. Absent statutory authorization, such extension of law-enforcement authority by rule is improper. The only instance where a dispatcher could seek authorization for arrest at the request of the arresting officer is if the dispatcher is a law enforcement officer.
- 6.3.5. [Also see 7.3.2.] The section deals with continuing authority to arrest after the perpetrator has left the scene if danger existed when the perpetrator was at the scene and an arrest could have occurred. No limitation is placed on this arrest authority and it could continue until the next day or perhaps longer. The only limitation is that the officer "should" obtain a warrant at the next "reasonable opportunity". This seems like an unreasonable extension of the provisions of H.B. 2427 without some qualifying language regarding "hot pursuit" and length of time for obtaining a warrant once the perpetrator is no longer "at the scene".
- 6.3.6. The heading does not jibe with the content of this section. And the language used in this section is not related to the duties of law-enforcement officers but rather the duties of magistrates, which latter are beyond the rule-making authority of the Committee.
- 6.3.7.1. The parenthetical note is purely instructive and unnecessary given other provisions in the rule for felony arrests.
- 7.2. Because arrest at the scene may occur in a variety of ways as noted previously in the rule, the title of this section is misleading.
- 7.2.4.3. "Every practicable effort" to communicate with a magistrate. See comments at 5.3.8.5. This standard is outside the statutory language.
- 7.2.1. and 7.2.2. Should say that a signed witness statement has to be gotten before seeking authorization from a magistrate.
- 7.2.4. with 7.2.4.2. Should include corroborative evidence standard in §48-2A-14.
- 7.3.4.3. Reference to a magistrate having access to radio communications through a dispatch site or the radio of another officer could be misleading. The concern is that this could be construed to mean that a magistrate is authorized to go to

a dispatcher's officer to conduct official duties, which is improper under Mag. Admin. Rule 1.

7.3.4.6. Again, the concern that 12 hours, an excessive period, of custody may occur under the rule.

7.3.4.7. Magistrates would violate their ethical and legal duty to remain neutral and detached and could subject themselves to disciplinary action if they would go to the scene. It is not even a possibility and should be omitted.

7.4. In addition to going beyond the Committee's purpose [§48-2A-9] of developing rules governing law enforcement duties under the §48-2A-1 et seq., the rule attempts to define what is considered official court business. W. Va. Code §48-2A-14 specifically makes receiving and acting on requests for arrest authorization a duty of magistrates and the authorization is therefore official court business. Only a statute and the rules of the Supreme Court may direct what constitutes conduct of court activity and where that activity may occur.

9.2. Reference is made to a "Victim's Rights Information Packet". Since the contents of this packet or when the material was last updated is not known, review is suggested so that it is consistent with Harman v. Frye and the resulting change to Mag. Crim. Rule 3 prohibiting filing of criminal complaints by citizens unless there is an express statutory authorization.

9.3.2. and 10.1.4. The "automatic" imposition of bail conditions only applies to cases where battery is alleged per §48-2A-14(i).

9.4. It is not the duty of law enforcement under the §48-2A-1 et seq. to inform an alleged victim of the deferral of fee payment or the availability of a financial affidavit and therefore should not be included in the rule governing law-enforcement response.

10.1.2. Procedurally, a law-enforcement officer swears to a complaint and not a warrant. Since the person is arrested and is before a magistrate, no warrant is required or need be issued in such circumstances.

10.1.3. Rather than stating the duty of the magistrate under Mag. Crim. Rule 5, if instruction is needed for law enforcement regarding the initial appearance, then this section should deal with a law-enforcement officer completing a criminal complaint and swearing to or affirming its contents before a magistrate; if the magistrate finds probable cause on the complaint, an initial appearance is held and bond is set. If no probable cause is found on the complaint, the accused is released.

- 10.2. The accused is taken before a magistrate for the filing of a criminal complaint; only if probable cause is found on the complaint will an initial appearance be conducted. If probable cause is not found, the accused has to be released without there being an initial appearance.
- 10.4. Refers to the incorrect provision in 10.1.4. about "automatic" conditions of bail for arrests of both assault and battery when such only relates to arrests for battery.

If the Governor's Committee would like any further comment, we would be willing to provide it to the extent we are able to do so.

Sincerely,



Ted Philyaw
Administrative Director of the Courts



Richard Rosswurm
Chief Deputy



Peggy Rash
Assistant Director

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of July, 1993, the following order was made and entered:

IN RE: **AMENDMENTS TO RULES 1(b), 1A, 6(a), AND 6(b) OF THE
ADMINISTRATIVE RULES FOR THE MAGISTRATE COURTS OF
WEST VIRGINIA**

On this day, came the Court, on its own motion, and proceeded to consider amendments to Rules 1(b), 1A, 6(a), and 6(b) of the Administrative Rules for the Magistrate Courts of West Virginia. Upon consideration whereof, the Court is of opinion to and doth hereby order that Rules 1(b), 1A, 6(a), and 6(b) of the Administrative Rules for the Magistrate Courts of West Virginia be, and the same are hereby amended, effective September 1, 1993, with deletions indicated by strike-throughs and insertions indicated by underscoring.

**"ADMINISTRATIVE RULES FOR THE MAGISTRATE COURTS
OF WEST VIRGINIA**

Rule 1. Hours of Magistrate Court.

* * *

(b) On Call. One magistrate in each county, on a rotating basis, shall be on call at all times other than regular office hours. On-call duties shall ~~be limited to~~ extend, in criminal cases, to initial appearances; to taking bond for someone who is in jail; and to receiving and acting upon emergency search warrants, domestic violence matters, and juvenile abuse and neglect matters.

(1) Initial Appearances and Taking Bond in Criminal Cases. Within the time periods provided for below, the on-call magistrate shall contact the county or regional jail, whichever applies, and the juvenile detention facility that ~~services~~ serves the county, and shall inquire whether any person has been arrested in the county since the close of regular business hours or since ~~his~~ the last contact with the jail, or whether anyone confined to the jail is able to post bond. If an arrest has been made or if a prisoner is able to post bond, the magistrate shall proceed immediately to the magistrate court offices to conduct an initial appearance and to set bail for such person, or to accept bond for someone already in jail.

It shall be sufficient to comply with this rule if the on-call magistrate contacts the jail and juvenile detention facility:

(A) Between 10:00 p.m. and 11:00 p.m. on judicial days;

(B) Between 10:00 a.m. and 11:00 a.m. and between 10:00 p.m. and 11:00 p.m. on Saturdays and holidays; and

(C) Between 12:00 p.m. and 1:00 p.m. and between 10:00 p.m. and 11:00 p.m. on Sundays.

~~Sunday shall be a judicial day for the limited purposes of conducting the initial appearance and setting bail. Upon request by the defendant and if deemed appropriate by the magistrate, Sunday shall also be a judicial day in such cases for the purpose of arraignment, and upon a plea of guilty or no contest, for the purpose of sentencing.~~

(2) Emergency Search Warrants, Domestic Violence Matters, and Juvenile Abuse and Neglect Matters. The on-call magistrate shall be available and responsible for the issuance, ~~on proper receiving and acting upon~~ applications of for emergency search warrants; and petitions for domestic violence protective orders; and, pursuant to W. Va. Code § 48-2A-14, requests from law enforcement officers for authorization of arrests made without warrant for assault or battery in domestic violence situations. The on-call magistrate shall make and file with the clerk a record of every request for a warrantless arrest authorization and his or her action thereon. The on-call magistrate shall also respond at any time for the purpose of holding a temporary custody proceeding pursuant to W. Va. Code § 49-6-3(c). When contacted concerning any of these matters, the on-call magistrate shall conduct such emergency action as may be necessary may be conducted at the magistrate court offices or at any other appropriate location approved for such purpose by the supervising circuit judge, except that the on-call magistrate may act from any location in response to telephonic requests for warrantless arrest authorization.

Rule 1A. Conduct of Proceedings; Judicial Day. (a) Except as provided in Rule 1, magistrates shall conduct all judicial proceedings in the magistrate court offices in the county.

(b) "Judicial day;" ~~as used in these rules, for magistrate courts~~ shall mean every day except Sunday and ~~at any~~ legal holidays listed in or declared pursuant to W. Va. Code § 2-2-1. A magistrate may not conduct a any judicial proceeding or ~~enter an issue any order on any nonjudicial day except: (1) to conduct initial appearances in criminal cases as stated in Rule 1(b)(1), and (2) to entertain emergency search warrants, domestic violence matters, and juvenile abuse and neglect matters as stated in Rule 1(b)(2); for~~ proceedings expressly required by Rule 1(b)."



RECEIVED MAY 28 1993

Department of Public Safety
(West Virginia State Police)
725 Jefferson Road
South Charleston, West Virginia 25309-1698

Gaston Caperton
Governor

Colonel Thomas L. Kirk
Superintendent

May 27, 1993

David B. McMahon
West Virginia Legal Services Plan, Inc.
Suite 700
1033 Quarrier Street
Charleston WV 25301

Dear Mr. McMahon:

I have been advised that you are currently in the process of redrafting Title 149: Legislative Rule from the Governor's Committee on Crime, Delinquency and Correction pertaining to the Police Response to Domestic Violence to comply with the upcoming changes in Domestic Violence law due to the passage of HB 2427. I have also been advised that HB 2427 does not truly take into consideration those occasions when the responding officer is hampered by the inability to complete a radio transmission. I assure you that within the West Virginia State Police these situations do indeed occur. Our agency does have the advantage of having a dispatcher available at all times, but that dispatcher may not be present at the local detachment. The available dispatcher may be located at a primary dispatch site. For example, when there is no dispatcher on duty at the Clay detachment, the trooper's contact will be a dispatcher at the South Charleston detachment. Although this does provide the trooper access to a dispatcher, it at times presents some problems.

There are times when a trooper is incapable of sending or receiving radio messages because of his/her physical location. The officer finds him/herself in what is termed a "dead spot", an area where a complete radio transmission cannot be made. This is often due to the geographical makeup of an area and West Virginia's rough mountain terrain only exacerbates the inability to make radio contact. Although our agency has been actively attempting to replace our radio towers and position them in more efficient locations, the older equipment and the inappropriate number of "repeater sites", due to the tower locations, make "dead spots" even more prominent. Also, the greater the distance an officer is from the dispatcher, particularly when relying on a primary dispatch site, the increased possibility of being caught in a "dead spot".

Page Two (2)
May 27, 1993
David B. M^cMahon

On rare occasions, atmospheric conditions may play havoc on radio transmissions, but what has a greater effect on not being able to make radio contact is the actual type of radio equipment employed by our agency. Generally speaking, the only radio available to our troopers is the one installed in the patrol vehicle. As most troopers do not have access to a hand held radio unit, there is no radio contact with the dispatcher once the officer has left the vehicle. This holds even more relevance with domestic situations since the recommended procedures for an officer's approach to a domestic violence incident includes not parking directly in front of the scene. This places the officer even further from the radio than with other types of calls. When the patrol vehicle is a distance from the officer and the incident scene has no available telephone, it is then an impossibility for the officer to make contact with a magistrate. This of course causes conflicts with the restrictions set by HB 2427.

I understand that you are attempting to compose the rules and regulations to make provisions for the aforementioned situations. I most certainly hope you are able to construct viable options that take in consideration the true conditions faced by West Virginia's law enforcement personnel.

Sincerely,



LT. COLONEL GARY N. GRIFFITH
DEPUTY SUPERINTENDENT
WEST VIRGINIA DIVISION OF PUBLIC SAFETY

GNG:SGM/sc

cc: Corporal S. G. Midkiff
file

JUSTIFICATION FOR POLICY CHANGE
RELATING TO POLICE OFFICERS APPROACH TO SCENE

Prepared by
Officer Gayle Midkiff
West Virginia Department of Public Safety

It was assessed from a ten year study (1979 - 1988) of law enforcement officers killed in the line of duty, that 74% of the officers killed in domestic disturbance calls never actually set foot in the residence. 41% of officers were killed as they immediately left their vehicles when approaching the residence or incident scene. Of these fatalities, 23% were the result of an ambush. When comparing the statistics of officer deaths in domestic incidents to those deaths occurring under other circumstances, it was determined that an officer is 2 1/2 times more likely to be ambushed in a domestic situation than when responding to other types of calls. This figure once again demonstrates the need for an inconspicuous approach.

Although these figures may be somewhat dated, a review of the 71 officers killed in 1991 support the older statistics. On first glance, it appears that only 9 of the 71 officers killed in 1991 died in a domestic disturbance, but further study indicates that actually 13 (18.3%) of the officers dies in domestically "related" incidents. Ten (10) officers were murdered when responding to an incident or serving an order. Of those killed when responding/serving, 4 (40%) were ambushed. The proper approach techniques become critical, as the risk to the officer is initiated as soon as he/she nears the scene. The arrival should be unobtrusive and unexpected, so the approach to the incident scene should be without the use of siren and lights. Parking directly in front of the scene only draws attention to the approach and should be avoided, but the officer should park in a location that provides a viable and easy exit.

A successful approach is not only necessary for the officer on the scene, but to many others as well. Domestic incidents have the potential of growing unmanageable. One of the 1991 cases exemplifies the deadliness of these calls. In this specific incident, the responding officer was killed by the batterer outside the perpetrator's residence. The assailant then left the scene and ambushed an officer who was just departing the Sheriff's department in her assigned vehicle, killing that officer. The gunman then drove to another officer's residence where he killed the officer's wife. He then proceeded to another officer's house, ambushed and wounded that officer, but not fatally. When responding to the officer's assault, the Sheriff was ambushed and killed by the gunman. The assailant then took an elderly woman hostage, but was finally apprehended after negotiations were conducted.

Other incidents, in addition to the aforementioned situation, point out that when the officer was unable to establish immediate control of the situation and was murdered as a result the assailant continued to kill and injure other law enforcement personnel and civilians. It became evident that immediate control is essential and this control is more easily established when the responding officer has accomplished an inconspicuous approach/arrival.

References:

**"The Tactical Edge" by C. Remsbery
Law Enforcement Officers Killed and Assaulted: 1991, Uniform Crime Reports
U.S. Department of Justice, Federal Bureau of Investigation.**



* A G E N C Y A P P *