

Criminal NCOs v. Civil POs

Lynn Keller, Seth Lahn, & Karen Wrenbeck

Monroe County Bench Bar Conference - 2021

No Contact Orders - Overview

- Issued as part of a criminal case.
 - Prohibits the defendant from directly or indirectly contacting an individual associated with criminal case
 - Does not survive past completion of probation/executed sentence.
- Violations can result in:
 - A new criminal charge (Invasion of Privacy),
 - Revocation of bail/pretrial release,
 - Aggravator for sentencing, and/or
 - Revocation of a suspended sentence or removal from home detention.
- NOTE: Could also result in a contempt finding, but need to be careful about double jeopardy issues (particularly during the pretrial phase). See *Buford v. State*, 139 N.E.3d 1074 (Ind. Ct. App. 2019)

Arrest/Charges
filed

- **IC 35-33-8-3.6**: For violent crimes with injury → if released to bail prior to IH, the court SHALL include NCO conditions (to last for 10 days or until IH, whichever occurs first).

Initial Hearing

- **IC 35-33-8-3.6**: The court may reinstate or modify NCO conditions previously issued under this section..

Bail Review

- **IC 35-33-8-3.2** – NCO may be imposed as condition of bail or while in pretrial detention.
- Aimed at assuring future appearance at legal proceedings and increasing physical safety of victim/community.

Conviction/
Sentencing

- **IC 35-38-2-2.3(a)(18)** – NCO as a condition of probation.
- **IC 35-38-1-30** – NCO as a condition of executed sentence.

IC 35-33-8-3.2

- **(4)** [The Court may]....require the defendant to refrain from any direct or indirect contact with an individual...including if the defendant has not been released from lawful detention.

POLL – Which of the following are delineated factor(s) that the Court must consider when deciding whether to issue a NCO under this statute?

- a. Victim's position
- b. Risk of flight
- c. Safety of the community
- d. All of the above
- e. Only B and C

Court Considerations Under IC 35-33-8-3.2

- After considering:
 - The results of the Indiana pretrial risk assessment system (if available),
 - other relevant factors,
 - and bail guidelines described in section 3.8 [[IC 35-33-8-3.8](#)] of this chapter
 - [35-33-8-3.8](#): IRAS-PAT + other relevant factors = no substantial risk of flight or danger → court shall consider ROR + appropriate conditions determined by Court
- a court may admit a defendant to bail and impose any of the following conditions
- to assure the defendant's appearance at any stage of the legal proceedings, or,
- upon a showing of clear and convincing evidence that the defendant poses a risk of physical danger to another person or the community, to assure the public's physical safety:

Prosecutor Considerations – Relevant Factors

- **Lethality factors**
- Criminal history or other relevant documented history
- History of noncompliance with court orders
- Victim's position
- Defendant's access to the victim
- Integrity of the case – risk of witness tampering/intimidation

National District Attorneys Association, NDAA Women Prosecutors Section, The National Domestic Violence Prosecution Best Practices Guide (July 17, 2017; revised June 23, 2020)

Jennifer G. Long, Christopher Mallios & Sandra Tibbetts Murphy, Model Policy for Prosecutors and Judges on Imposing, Modifying and Lifting Criminal No Contact Orders , The Battered Women's Justice Project (February 2010)

The Washington Post
Democracy Dies in Darkness

Domestic slayings: Brutal and foreseeable

The Washington Post found that nearly half of the women who were murdered during the past decade were, like Parnell and Cisneros, killed by a current or former intimate partner. In a close analysis of five cities, about a third of the male killers were known to be a potential threat ahead of the attack.

By Katie Zezima, Deanna Paul, Steven Rich, Julie Tate and Jennifer Jenkins Dec. 9, 2018

Lethality Factors

POLL: In the context of IPV relationships, which factor is associated with an increased risk of future homicide of victims?

- Strangulation
 - Death threats
 - Use of weapons
 - All of the above
-
- Dr. Jacquelyn Campbell of Johns Hopkins University
 - <https://www.dangerassessment.org>
 - <https://www.lethalityassessmentprogram.org/>

Related Considerations

- IC 35-40-5

- (1) Victims have the right to be free from intimidation, harassment and abuse throughout the criminal process.

- (3) Prosecutor's Office required to confer with the victim at three stages of the criminal process (after charging, before trial, before disposition).

- NOTE: This DOES NOT include the authority to direct the prosecution.

- (4) Victims have the right to have their safety considered by the Court in determining pretrial custody/release.

- IC 35-37-4-12

- If physical safety of victim or victim's family is in danger, victim may not be required to give phone number, employment, or address in sworn testimony.

When a PO already exists....

- POs and NCOs are similar but not the same:
 - Both can be active at the same time – neither is dependent on the other
 - MCPO will never dissuade a victim from pursuing or maintaining a PO
 - Referrals → Middle Way House, civil legal services, Clerk's Office, etc.
 - There are good reasons why a victim *should* pursue a PO, despite the existence of a NCO:
 - Victim has more control over the PO
 - PO is not dependent on a criminal case
 - PO can typically last longer than a NCO
 - PO can typically include more extensive/tailored protections
 - MCPO will independently assess for a NCO, regardless of the existence of a PO
 - Focus is on offender accountability, victim safety, community safety

The grounds for a civil protection order under IC 34-26-5-2 are limited and specific:

Petitioner must show that the Respondent committed:

- Domestic or family violence against a family or household member
- Stalking (as defined in 35-45-10-5)
- Sex offense within IC 35-42-4
- Repeated acts of harassment (new in 2019)
- (when on behalf of a child) Course of conduct intended to groom the child for sexual activity.

What is “domestic or family violence?”

- Attempting to cause, threatening to cause, or causing physical harm to the petitioner
- Placing the petitioner in fear of physical harm
- Causing the petitioner to involuntarily engage in sexual activity by force or duress
- Abusing, torturing, mutilating, or killing a vertebrate animal without justification with the intent to threaten, intimidate, coerce.

Who is a “family or household member?”

A broad definition:

- A current or former spouse
 - A person who is dating or has dated
 - A person who is engaged or was engaged in a sexual relationship
 - A person who is related by blood or adoption
 - A person who has a child in common
 - A minor child of a person in a relationship of the described types above.
- + more

But: Not "Family or Household Members:"

Roommates

Neighbors

Classmates

Co-workers

Judge has extensive discretion to fashion equitable relief:

- Prohibit any contact
- Give Petitioner house, apartment, or car, regardless of ownership
- Award expenses stemming from abuse: counseling; replacement of damaged personal property, etc.
- Restrict parenting time
- Attorneys' fees against Respondent (not Petitioner)

Dunno v. Rasmussen, 980 N.E.2d 846 (Ind. Ct. App. 2012) .

But cf. C.H. v. A.R., 72 N.E.3d 996 (Ind. Ct. App. 2017)

Procedural notes on Civil Protection Orders:

- Can be brought against a minor; court may (but not required to) transfer to juvenile court after considering emergency relief.
- May only name a single respondent
- Petition must be drafted and submitted on state-mandated form

Other procedural notes:

A corporation – at least a school corporation,
filing on behalf of a child – can petition for a PO:

S.B. v. Seymour Comm. Schls.

97 N.E.3d 288 (Ind. Ct. App. 2018)

Statute Intended to Make Process “Frictionless”:

- Very broad jurisdiction and venue
- No filing fee
- No minimum residency requirement
- If Petitioner requests, Court must dismiss immediately.

Length and renewal:

- Standard term of 2 years, but some room for discretion
- To extend or renew, new or continuing behavior must be shown.

S.H. v. D.W., 139 N.E.3d 214 (Ind. 2020)

J.K. v. T.C. 25 N.E.3d 179 (Ind. Ct. App. 2015)

Trend of “push-back” from COA on stalking PO’s:

R.H. v. S.W., 142 N.E.3d 1010 (2020).

L.O. v. D.O., 124 N.E.3d 1237 (2019):

“The reality is that tensions and emotions during a dissolution often run high. Argumentative or annoying behavior is not uncommon, but it does not rise to the level of threatening behavior.”

C.S. v. T.K., 118 N.E.3d 78 (2019).

C.V. v. C.R., 64 N.E.3d 850 (2016)