

Concurrent Civil Protection Orders Hearings & Criminal Proceedings Bench Card: Addressing Continuance Requests

I. GENERAL EXPLANATION:

At the beginning of the protection order calendar, as part of your introductory script¹ that lays out the ground rules and provides an overview of the hearing process in plain language, **best practice is to provide a brief explanation of the 5th amendment and the parties' associated rights, e.g.:**

- i. There is a 5th Amendment right to remain silent.
- ii. The 5th Amendment is to ensure a party is not required to make statements in court that can be used against them in a current or future criminal investigation or prosecution
- iii. If the 5th Amendment is invoked, a party can still submit evidence and witness statements supporting their position

II. INDIVIDUAL CASES:

Refer back to explanation of 5th amendment rights given at the beginning of the calendar. Ask the parties whether they have any questions and whether they are prepared to move forward with the hearing. If the respondent requests a continuance due to the pendency of a criminal case, the Court **must** apply RCW 7.105.200(4) and 7.105.400(4), as follows:

- i. **AGREEMENT:** If the parties agree to the continuance, the court may enter an agreed order of continuance.²
- ii. **CONTESTED:** There is a **rebuttable presumption against delay** due to the pendency of a parallel criminal investigation or prosecution of the respondent.³
 1. Initially, to **learn about the status of the criminal case(s)**, you may wish to instruct the parties that you want to learn about procedural details that the parties know regarding any potential or existing criminal matter without hearing the underlying facts of the case. Suggested questions:
 - a. Has there been a police report?
 - b. At what stage is the investigation as far as you know?
 - c. Has the case been referred to the prosecutor's office?
 - d. Has the State declined to file charges?
 - e. Has the State filed charges in the criminal matter? If so, what has happened in the criminal case so far?

¹ A civil protection order script template is provided here:

https://www.courts.wa.gov/content/publicUpload/GJCOM/FINAL_Civil_Protection_Order_Script.pdf. See also "Advancing Procedural Justice on Your Protection order Docket" Bench Card, available at <https://www.courts.wa.gov/subsite/gjc/documents/Procedural%20Justice%20Bench%20Card%20-%20KCSARC.pdf>

² RCW 7.105.400(1)(a).

³ RCW 7.105.200(4), RCW 7.105.400(4).

iii. The court’s decision on whether to continue the case should consider the following eight unweighted factors, and *address them on the record as required by case law*.⁴

1. *The extent to which a defendant's Fifth Amendment rights are implicated*

- a. A decision based on weighing the factors will be reviewed for an *abuse of discretion*, and the “special nature” of DVPO proceedings can support a conclusion that there is “minimal to nonexistent” infringement of Fifth Amendment privileges “compared to the potentially heavy burden a stay” may impose on a petitioner in the circumstances of a particular case.⁵
- b. “The absence of an indictment is not without consequences. For one thing, it makes more difficult the analysis of the potential criminal jeopardy.”⁶
- c. “The extent to which a party's right against self-incrimination is implicated in civil proceedings must be given 'serious consideration' in the balancing of interests.⁷ It is not determinative; it is ‘only one consideration to be weighed against others.’”⁸

2. *Similarities between the civil and criminal cases*

- a. The Court should consider whether either of the proceedings is broader or narrower than the other, such as is protection order including conduct that are not covered in criminal case.
- b. If a police report has been filed, or if there is a pending criminal case, ask questions about the allegations in that case: What are the charges? Is there a probable cause certification available for review? Does that case involve the same alleged victims?
- c. “One of the most important factors in the balancing process is ‘the degree to which the civil issues overlap with the criminal issues’ because ‘[i]f there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay.’ Thus a stay is most appropriate where the subject matter of the parallel civil and criminal proceeding or investigation is the same.”⁹

3. *Status of the criminal case*

- a. “The status of the criminal case includes the likely speed of its resolution. Where there is not yet a formal charge, resolution of the criminal matter may be so remote it should not be awaited. On the other hand, if the resolution of criminal proceedings is close at hand, the detriments of a stay are counterbalanced by the prospect of a speedy criminal trial, and by the potential res judicata or collateral estoppel effects of resolution of common issues.”¹⁰

⁴ *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 375, 16 P.3d 45 (2000).

⁵ *Smith v. Smith*, 1 Wn. App. 2d 122, 141, 404 P.3d 101 (2017) (“On balance, a court could reasonably decide that the Olympic Pipeline factors heavily weigh in favor of proceeding with the DVPO matter before resolution of [the respondent’s] criminal case. Because of the special nature of DVPO proceedings, there is minimal to nonexistent infringement on [the respondent’s] Fifth Amendment privilege compared to the potentially heavy burden a stay would impose on [the petitioner]. Also, staying DVPO proceedings frustrates the purpose of the DVPA—to provide quick and effective access to the judicial system to victims of domestic violence. The superior court did not abuse its discretion by granting the DVPO while [the respondent’s] criminal matter was pending.”).

⁶ *Id.* at 53.

⁷ *Olympic Pipeline*, 16 P.3d at 53 citing *White v. Mapco Gas Prods., Inc.*, 116 F.R.D. 498, 502 (E.D.Ark.1987) and *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y.1985).

⁸ *Olympic Pipeline*, 16 P.3d at 53 citing *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir.1995).

⁹ *Olympic Pipeline*, 104 Wn. App. at 357, 16 P.3d 45 (alteration in original) (footnotes omitted) (quoting Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (1990).

¹⁰ *Id.*

4. ***Interests of the petitioners in proceeding expeditiously with litigation and the potential prejudice and risk to petitioners of a delay***
 - a. Consider burdens to the petitioner such as taking time off of work, arranging childcare, transportation to in-person hearings, re-traumatization of seeing respondent in court.
 - b. How many continuances have already been granted in this case?
 - c. Consider safety risks to the petitioner and/or their minor children. Are children protected in the temporary order? Where applicable, has the respondent complied with any ex parte Order to Surrender Weapons? Is there a temporary order currently in place?
 - d. Consider whether evidence (memory, witnesses, etc.) will become stale.
 - e. Consider whether a continuance may lead to attrition or force the petitioner to seek relief in another court (criminal or family law).
 - f. “When a court repeatedly continues DVPO proceedings, the system becomes too challenging to navigate and pro se litigants are forced either to abandon their claims or seek pro bono or hired counsel if they are able.”¹¹
 - g. “Prolonged court proceedings increase the risk of danger to a victim of domestic violence.”¹²
5. ***The burden that any particular aspect of the proceeding may impose on respondents***
 - a. Consider such burdens as diversion of resources by the respondent to defend civil and criminal actions, impact of invocation of privilege in providing “road map” for investigation by prosecution, possible media attention/publicity.
 - b. Has the respondent had adequate time to submit evidence and statements in response?
6. ***The convenience of the court in the management of its cases and the efficient use of judicial resources***
 - a. Consider efficient use of judicial resources such as calendar congestion and duplicative judicial efforts.
7. ***Interests of persons not parties to the civil litigation***
 - a. Consider the protection of minor children.
 - b. Consider the institutional interests such as schools, employers, or other agencies involved, such as DCYF.
8. ***The interest of the public in the pending civil and criminal litigation***
 - a. Consider the public interest in integrity of the judicial system and prevention of further violence.
 - b. Legislative intent of Chapter 7.105 RCW is to provide “**a fast, efficient means**” for petitioners to seek protection against abuse, violence, harassment, stalking, neglect, or other threatening behavior.¹³
 - c. “**Relief under this chapter must not be denied or delayed on the grounds that the relief is available in another action.** The court shall not defer acting on a petition for a protection order nor grant a petitioner less than the full relief that the petitioner is otherwise entitled to under this chapter because there is, or could be, another proceeding involving the parties including, but not limited to, any potential or pending family law matter or criminal matter.”¹⁴

¹¹ *Smith*, 404 p.3d at 107.

¹² *Juarez v. Juarez*, 195 Wn. App. 880, 889, 382 P.3d 13 (2016).

¹³ RCW 7.105.900(1).

¹⁴ RCW 7.105.105(6).

- d. “The court may not deny or dismiss a petition for a protection order on the grounds that... A no-contact order or a restraining order that restrains the respondent's contact with the petitioner has been issued in a criminal proceeding or in a domestic relations proceeding [or] he relief sought by the petitioner may be available in a different action or proceeding, or criminal charges are pending against the respondent...”¹⁵
- e. “The practice of dismissing or suspending a criminal prosecution in exchange for the issuance of a protection order undermines the purposes of this chapter. Nothing in this chapter shall be construed as encouraging that practice.”¹⁶
- f. “Any proceeding under this chapter is in addition to other civil or criminal remedies” and “[n]othing in this chapter shall be construed as requiring criminal charges to be filed as a condition of a protection order being issued.”¹⁷
- g. “A victim [of sexual assault] should be able to expediently seek a civil remedy requiring that the perpetrator stay away from the victim, independent of the criminal process and regardless of whether related criminal charges are pending.”¹⁸
- h. “Victims are in the best position to know what their safety needs are and should be able to seek these crucial protections without having to rely on the criminal legal system process. The legislature further finds the surrender of firearms in civil protection orders is critical to public health. In keeping with the harm reduction approach of this lifesaving tool, the legislature finds that it is appropriate to allow for immunity from prosecution for certain offenses when appropriate to create a safe harbor from prosecution for certain offenses to increase compliance with orders to surrender and prohibit firearms.”¹⁹

III. CONTINUANCE GRANTED:

If a continuance is granted pursuant to RCW 7.105.200(4) and/or RCW 7.105.400(4) on the basis of a pending criminal matter, the court should determine the duration of the continuance based on the circumstances and in light of the rebuttable presumption against delay contained in those subsections. The statute does not expressly prescribe the duration of a continuance granted due to a pending criminal matter after a Fifth Amendment analysis. Consider the burden on parties to come back to court repeatedly in short intervals.

- i. Best practice is to memorialize the balancing in the temporary or final order. Document in the order the circumstances, factors, findings and conclusions regarding the continuance request and length of the continuance granted, including representations by the parties, to memorialize the information on which the Court relied and the expectations underlying the order.
- ii. Reissuance and weapons surrender should be addressed in the order as appropriate.

IV. CONTINUANCE DENIED:

If a continuance is not granted the hearing may proceed to determine whether the petitioner has met their burden of proof. Respondent may choose to exercise their 5th Amendment right.

- i. Best practice is to document why the continuance was denied including circumstances, factors, findings and conclusions in balancing the statutory elements.

¹⁵ RCW 7.105.225(2)(c)-(d).

¹⁶ RCW 7.105.375.

¹⁷ RCW 7.105.565.

¹⁸ RCW 7.105.900(3)(b).

¹⁹ RCW 7.105.900(4).