PO CASELAW BENCH GUIDE

1. Protection Order Actions Are Designed To Protect Pro Se Victims

- Core Values. *Aiken v. Aiken*, 187 Wn.2d 491, ¶10 (2017) (RCW 26.50 DV action) –
  - Emergency Relief. Protection order proceedings are designed to provide emergency relief to victims and children.
  - Statutory Safeguards. Safeguards for both parties are built into the statutory structure.
  - Designed for Pro Se Litigants. The system is designed for use by pro se litigants because many victims are unable to retain counsel.
- Forms and Brochures. Courts are required to use AOC developed and prepared protection forms and instructional brochures, which are to be made available to litigants by court clerks.
  - Antiharassment. RCW 10.14.050.
  - Stalking and Antiharassment. RCW 10.14.800 (antiharassment, and stalking protection orders issued under RCW 7.92, "must substantially comply" with the AOC pattern forms).
  - Domestic Violence. RCW 26.50.035 ("The standard petition and order for protection forms must be used … for all petitions filed and orders issued under this chapter.").
  - Informational Brochure. RCW 26.50.035(1)(b). (The informational brochure shall describe the use of and the process for obtaining, modifying, and terminating protection orders.)

2. Delay Denies Meaningful Access To Courts, And Places Victims At Risk

- Smith v. Smith, 1 Wn.App.2d 122 (2017) (RCW 26.50 DV action continued 4 times over 8 months with 5 temporary orders being issued before a full order was granted due to respondent being charged in parallel criminal proceeding with multiple counts of child rape.) –
  - Constitutional Access to Courts. Delay denies protection action petitioners of their right to meaningful access to the courts. The legislature created an expedited process to provide victims with "easy, quick, and effective" access to the courts. *Smith*, ¶23.
  - System Designed for Pro Se Petitioners. Delay hinders a victim's ability to act pro se in a system designed by the legislature for use by pro se litigants. Delay makes the system too challenging to navigate, and pro se litigants may be forced to abandon claims, or seek pro bono counsel, or hire counsel. *Smith*, ¶24.
  - More Protection Than Criminal Order. Delay places victims and their families at risk. A civil protection order offers a victim more protection than a criminal no contact order because the criminal order could terminate without notice to a victim if the criminal case is dismissed or defendant is acquitted. Unlike in a criminal case, a civil protection order victim would receive notice, and a chance to contest a termination of the order. *Smith*, ¶25.
  - Victims May Abandon Petition. Delay may cause victims to abandon the petition due to exhaustion, frustration, or logistical obstacles. A victim may not be able to get off work repeatedly or find childcare or transportation. Logistical impediments may pose a barrier to dissuade victims from pursuing a continuation of a temporary order. *Smith*, ¶26.

3. Protection Statutes Provide Courts With Broad Discretion To Grant Relief Courts Deem Proper

- Antiharassment. RCW 10.14.080(6) – "The court, in granting an ex parte temporary antiharassment protection order or a civil antiharassment protection order, shall have broad discretion to grant such relief as the court deems proper …"
- Stalking. RCW 7.92.110(2)(e) – "The trial court may provide relief as follows: (e) Order any other injunctive relief as necessary or appropriate for the protection of the petitioner…"
- Domestic Violence. RCW 26.50.070(1) – "[T]he court may grant an exparte temporary order for protection, pending a full hearing, and grant relief as the court deems proper…"

4. Courts Sitting In Equity May Fashion Broad Remedies To Do Substantial Justice To The Parties, And Put An End To Litigation

- Protection Actions are a Type of Injunction. Protection actions are a type of injunction. Injunctions are equitable in nature. *Blackmon v. Blackmon*, 155 Wn.App. 715, ¶14 (2010).
  - Trial courts sitting in equity must look to the circumstances surrounding each case when determining remedies. *Young v. Young*, 164 Wn.2d 477, ¶40 (2008).
- Broad Remedies. Sitting in equity, a court "may fashion broad remedies to do substantial justice to the parties and put an end to litigation." *Hough v. Stockbridge*, 150 Wn.2d 234, 236 (2003).
- District Courts Have Equitable Powers. District courts have had general equitable powers since Const. Art. IV, §6 was amended in 1993 to read – "Superior courts and district courts have concurrent jurisdiction in cases in equity." *Hough*, at 236, n.1.
  - This 1993 constitutional amendment expanded district court jurisdiction to hear cases in equity. This amendment authorized the legislature to allow RCW 10.14 harassment actions to be filed in district or superior courts. *Ledgerwood v. Lansdowne*, 120 Wn.App. 414, 421-22 (2004).
  - But see *State v. Brennan*, 76 Wn.App. 347, 351 (1994) (Previous version of Const. Art. IV, §6 read – "The superior court shall have original jurisdiction in all cases in equity …" Since an RCW 10.14 action is an action in equity, the legislature had "no power to give inferior courts concurrent jurisdiction with superior courts" to issue antiharassment orders. District courts lack subject matter jurisdiction to issue such orders because "all cases in equity" means all equity cases must be heard only in superior court.).
- Municipal Courts Have Statutory Equitable Powers in Protection Actions. Const. Art. IV, §6 also provides – "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court …"
  - Superior Court Not Exclusive Jurisdiction. This constitutional provision allows the legislature to limit the superior court's jurisdiction in certain matters, provided it vests authority over such matters "in some other court," presumably a court of limited jurisdiction. *Young v. Clark*, 149 Wn.2d 130, 133 (2003); *Moore v. Perrot*, 2 Wash. 1, 4 (1891) ("The language of the constitution is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created.").
  - Protection Orders. The legislature under this constitutional provision had the authority to provide that district and superior courts had concurrent original jurisdiction to have RCW 10.14 actions brought in either court. *McIntosh v. Nafziger*, 69 Wn.App. 906, 911-12 (1993).
    - But see *Brennan*, where a different pre-1993 provision of Const. Art. IV, §6 was analyzed to hold that district courts lacked equity powers.
  - Do Municipal Courts Handling Protection Actions Trench Upon Superior Courts' Ability? The legislature is constitutionally authorized to prescribe the jurisdiction of lower courts provided that such jurisdiction does not "trench upon" the jurisdiction of superior courts. *McIntosh*, at 911. The legislature has granted municipal courts' concurrent jurisdiction with superior and district courts to hear protection actions. Since superior courts retain jurisdiction, municipal courts can constitutionally also hear protection actions because they have equity powers granted by the legislature to hear them. [author's analysis]

5. Purpose Of Protection Statutes Is Not To Punish Obnoxious People

- Overbearing, Obnoxious or Rude People are Not Covered. Antiharassment statute is not designed to penalize people who are overbearing, obnoxious or rude. It is geared to protect those victims to whom objectionable behavior is directed. The statute is not intended to provide redress for past injury. The purpose is to prevent all further unwanted contact between the victim and the perpetrator. *Burchell v. Thibault*, 74 Wn.App. 517, 522 (1994).
- Incidental Victim. Member of religious sect was not victim of alleged harassment by excommunicated members and, therefore, could not bring action under antiharassment statute, where the petitioner just happened to be in the company of the reverend who was a target of harassment. *Burchell*, 74 Wn.App. at 522-23.

6. No Right To Jury Trial In Equitable Actions

- There is no constitutional right to a jury trial where the action is purely equitable. Protection order actions are essentially a type of injunction, and thus equitable in nature. Accordingly, neither party is entitled to have a jury decide whether a court should issue a protection order. *Blackmon v. Blackmon*, 155 Wn.App. 715, ¶¶11-14 (2010) (RCW 26.50 action).

7. Court Rules Do Not Apply Where Inconsistent With Protection Statutes

- CRLJ 81(a) – "These rules do not apply where inconsistent with rules or statutes applicable to special proceedings or infractions."
  - *Scheib v. Crosby*, 160 Wn.App. 345, ¶16 (2011) (RCW 26.50 DV protection action is a "special proceeding," CR 81(a), and thus is not governed by civil court rules. Trial court retained inherent authority and discretion to decide the nature and extent of any discovery. Trial court's ruling that no right to discovery in "special proceeding" without court's permission, and denial of motion to continue to depose petitioner, affirmed.).
- CRLJ 26 Discovery – Inconsistent With Protection Statutes? Query – Is the court rule authorizing discovery (e.g. interrogatories, requests for production, depositions, requests for admission) inconsistent with protection order statutes?
  - Antiharassment – Speedy and Inexpensive Protection From Harassment. "The legislature finds that serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing. The legislature further finds that the prevention of such harassment is an important governmental objective. This chapter is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator." RCW 10.14.010.
  - Stalking – Victims Deserve Access to Courts, and Protection. A stalking "victim should be able to seek a civil remedy requiring that the offender stay away from the victim … Victims of stalking conduct deserve the same protection and access to the court system as victims of domestic violence and sexual assault …". RCW 7.92.010.
  - Domestic Violence – Easy, Quick, Effective Access to Courts. Refinements are needed so that victims have the easy, quick, and effective access to the court system envisioned at the time the protection order process was first created. Laws of 1992, ch. 111, §1.
  - Victims' Access to Courts. See also *Smith v. Smith*, 1 Wn.App.2d 122 (2017) (delay denies victims access to the courts) [see Paragraph 2 above].

8. Evidence Rules Need Not Be Applied In Protection Actions

- ER 1101(c)(4). Evidence rules (other than with respect to privileges, the rape shield statute and ER 412 (sexual offenses – victim's past behavior)) need not be applied in protection order proceedings under RCW 7.90 (sexual assault), 7.92 (stalking), 7.94 (extreme risk), 10.14 (antiharassment), 26.50 (domestic violence) and 74.34 (vulnerable adult).
  - Judicial Information System Disclosure. When a judge proposes to consider information from a criminal or civil database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider.
- Evidence Rules. *Emmerson v. Weilep*, 126 Wn.App. 930, ¶20 (2005) (evidence rules need not apply in RCW 10.14 action).
- Hearsay is Admissible. Hearsay is admissible pursuant to ER 1101(c)(4). *Gourley v. Gourley*, 158 Wn.2d 460, ¶13 (2006) (RCW 26.50 DV action).
  - Hearsay; Documents. Trial court may base decision on hearsay, or wholly documentary evidence. *Blackmon v. Blackmon*, 155 Wn.App. 715, ¶15 (2010) (RCW 26.50 DV action).
  - Corroboration Not Required. There is no requirement that hearsay evidence be corroborated. *Maldonado v. Maldonado*, 197 Wn.App. 779, ¶31 (2017) (RCW 26.50 DV action. Children not required to testify to corroborate hearsay evidence of their fear.).
  - Email. Court may base decision on email along with allegations of prior abuse. *In re T.W.J.*, 139 Wn.App. 1, ¶¶11-13 (2016) (RCW 26.50 DV action).
- Non-Party Evidence is Admissible. A trial court may consider evidence of harassment submitted by individuals not a party to the proceeding. *Trummel v. Mitchell*, 156 Wn.2d 653, ¶22 (2006) (non-party tenants submitted declarations detailing harassing behavior in support of apartment administrator's RCW 10.14 antiharassment petition).

9. Cross Examination And Live Testimony

- Cross Examination is a Powerful Instrument. Cross examination is a powerful instrument in eliciting truth or discovering error in a statement. *Aiken v. Aiken*, 187 Wn.2d 491, ¶26 (2017) (RCW 26.50 DV action).
- Cross Examination May Improperly be Used to Intimidate. Cross examination may also be used for purposes other than truth seeking. The nature and purpose of witness examination, however, are to elicit honest testimony, not fearful responses, and to procure the truth, not cause intimidation. *Aiken*, ¶26.
- No Statutory Right to Subpoena Witness or to Cross Examination. Nothing in the protection action statutory scheme explicitly requires a trial court to allow respondent to cross examine a minor who has accused him of sexual abuse. Trial court's denial of cross examination of the child affirmed. *Gourley v. Gourley*, 158 Wn.2d 460, ¶¶25-27 (2006) (RCW 26.50 DV action) (Trial court allowed respondent to subpoena and depose petitioner. While the facts of this case did not require testimony or cross examination of the parties' minor child, live testimony and cross-examination might be appropriate in other cases. Our analysis is limited to the facts of this case.); *Aiken,* ¶¶9,13,16.
- No Bright Line Rule Prohibiting Cross Examination or Live Testimony. A bright line rule prohibiting cross examination or live testimony in protection order hearings is inappropriate.
  - Trial courts should consider the *Mathews* balancing test [below], and weigh the likely value of cross examination against the potential damage that testifying may have. An individualized inquiry into the facts of the case by the trial court is necessary. *Aiken*, ¶27.

9. Cross Examination And Live Testimony Continued

- The *Mathews* Test – Due Process May Require Cross Examination Through Live Testimony. Due process may require live testimony or cross examination in civil proceedings. *Aiken*, ¶¶9,13. Due process is a flexible concept; the level of procedural protection varies based on the circumstances. *Aiken*, ¶19. While a trial court is not required in every protection order proceeding to allow live testimony or cross examination, a trial court must consider the due process balancing test of *Mathews v. Eldridge*, 96 S.Ct. 893 (1976), *Aiken*, ¶¶13,19 –
  - (1) Private Interest. The [respondent's] private interest impacted by the government [trial court's] action;
  - (2) Risk and Probable Value. The risk of an erroneous deprivation of such interest through the procedures used [e.g. affidavits, depositions, documentary evidence], and the probable value, if any, of additional or substitute procedural safeguards [cross examination through live testimony]; and
  - (3) Additional Burden. The government interest [in protecting victims], including the additional burden that added procedural safeguards [such as cross examination through live testimony] would entail.
- Due Process Probably Requires Cross Examination of Adult Parties When Requested. Cross examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth. This is especially important where a petitioner may be seeking to take advantage through the use of the protection order process. Here, the petitioner was available for cross examination, and the trial court did not abuse its discretion in declining to permit the child to be called as a witness and cross examined. *Aiken*, ¶¶31-34 (Madsen, J., concurring, joined by Wiggins, J.).

10. Course Of Conduct

- Course of Conduct May be Brief. While the course of conduct may be brief, it must evidence a "continuity of purpose." *Burchell v. Thibault*, 74 Wn.App. 517, 521 (1994).
- Two Incidents Sufficient. Proof of two incidents of harassment is sufficient to support a conviction for stalking. *State v. Hai*nes, 151 Wn.App. 428 (2009).
- Course of Conduct Includes Harassment Through Third Persons. By defining "course of conduct" so broadly as to include any harassing communication, contact, or conduct that amounts to a series of acts over a period of time, the legislature contemplated that stalking, by definition, could include a perpetrator's direction or manipulation of third parties to harass a victim. *State v. Becklin*, 163 Wn.2d 519, ¶20 (2008).

11. Terms, Duration, Renewal And Termination

- Court May Tailor Order to Petitioner's Circumstances. The court may specifically tailor a protection order to the petitioner's circumstances by including multiple provisions forbidding the respondent from a variety of misconduct toward the petitioner. *State v. Stinton*, 121 Wn.App. 569, 575 (2004) (RCW 26.50 DV order).
  - Terms May Include Some Contact. Protection statute does not prevent drafting a protection order which allows some contact, for instance, by telephone or through a third party. There is no statutory requirement that all contact be prohibited. *State v. Dejarlais*, 136 Wn.2d 939, 945 (1998) (RCW 26.50 DV order).

11. Terms, Duration, Renewal And Termination Continued

- Duration Not Exceeding One Year. Petitioner not required to show respondent would likely resume acts of domestic violence where petitioner did not seek an order exceeding one year. *In re T.W.J.*, 193 Wn.App. 1, ¶14 (2016) (RCW 26.50 DV order).
  - Less Than One Year Order Permitted. A trial court need not grant a one-year order if tenable grounds support issuance of a shorter order. *Maldonado v. Maldonado*, 197 Wn.App. 779, ¶46 (2017) (RCW 26.50 DV order. Four month order authorized.).
- Permanent Duration.
  - Antiharassment – Likely to Resume Harassment. If court finds respondent “is likely to resume unlawful harassment of the petitioner when the order expires,” order may be for a fixed time exceeding one year or may be permanent. RCW 10.14.080(4).
  - Stalking – Fixed Period or Permanent. A stalking protection order “shall be effective for a fixed period of time or be permanent.” RCW 7.92.130(1).
  - Domestic Violence – Likely to Resume Domestic Violence. If court finds respondent “is likely to resume acts of domestic violence against the petitioner or the petitioner’s family or household members or minor children when the order expires,” order may be for a fixed period or be permanent. RCW 26.50.060(2).
    - Proof of Recent Violent Act Not Required. The legislature’s intent is to intervene before any injury occurs. Accordingly, an allegation of recent domestic violence is not required before a court may enter a permanent order. *Spence v. Kaminski*, 103 Wn.App. 325, 333-34 (2000) (RCW 26.50 DV order).
  - Appeal – Clear Showing of Abuse of Discretion. Appellate courts will not disturb a trial court’s decision to enter a permanent protection order absent a clear showing of abuse. *Hecker v. Cortinas*, 110 Wn.App. 865, 869 (2002) (RCW 26.50 DV order).
- Renewal – Burden on Respondent; Petitioner Has No Burden.
  - Antiharassment. Court shall renew order unless respondent proves by preponderance of evidence that he or she will not resume harassment of petitioner when order expires. RCW 10.14.080(5).
  - Stalking. Court shall renew order unless respondent proves by preponderance of evidence that he or she will not resume acts of stalking conduct of petitioner or children or family or household members when order expires. RCW 7.92.130(2).
  - Domestic Violence. Court shall renew order unless respondent proves by preponderance of evidence that he or she will not resume acts of domestic violence against petitioner or children or family or household members when order expires. RCW 26.50.060(3).
    - New Act of Violence Not Required. Showing of a new act of domestic violence is not required to obtain extension of order. *Barber v. Barber*, 136 Wn.App. 512, ¶10 (2007) (past abuse, and present fear of injury sufficient).

11. Terms, Duration, Renewal And Termination Continued

- Termination of Permanent Order – Burden on Respondent; Petitioner Has No Burden.
  - Respondent has same burden as renewal when seeking to modify or terminate a permanent order. Trial court shall consider the 11 following factors where respondent moves to terminate a permanent order, *Freeman v. Freeman*, 169 Wn.2d 664, ¶¶17-18 (2010) (RCW 26.50 DV order), –
    - (1) whether victim has consented to lift the order, (2) victim's fear of the restrained party, (3) present nature of the relationship between parties, (4) whether restrained party has any contempt convictions for violating the order, (5) restrained party's alcohol and drug involvement, if any, (6) other violent acts on the part of restrained party, (7) whether restrained party has engaged in DV counseling, (8) age and health of restrained party, (9) whether victim is acting in good faith to oppose the motion, (10) whether other jurisdictions have entered any protection orders against restrained party, and (11) other factors deemed relevant by the court.

12. Clerk Shall Transmit Order To Law Enforcement Within 1 Judicial Day

- Mandatory Clerk Action. Washington's protection order statutes require the county clerk and/or limited jurisdiction clerk of the court to transmit protection orders to law enforcement "on or before the next judicial day."
  - RCW 10.14.110 (antiharassment actions); RCW 7.92.180(1) (stalking actions); RCW 10.99.040(6) (pending criminal actions for domestic violence offenses); RCW 26.09.050(3) (final dissolution decrees), .060(8) (pending dissolution actions); RCW 26.26.130(11) (parentage actions); RCW 26.50.100(1) (domestic violence protection orders).
- Malfeasance, Misfeasance, Violation of Oath of Office. Failure to transmit protection orders within 1 judicial day constitutes "some act or acts of malfeasance or misfeasance while in office," or a violation of one's oath of office. *In re Recall of Riddle*, 189 Wn.2d 565 (2017) (failure to transmit protection orders to law enforcement within 1 judicial day is both factually and legally sufficient to support a recall petition against county clerk).

13. Civil Standby

- Civil Standby Definition. The parties do not provide a definition of a "civil standby," but a Texas appellate decision cites the testimony of a police officer explaining, "[A] civil standby is when an officer is basically called to come out basically to make sure there is no breach of the peace." *Osborne v. Seymour*, 164 Wn.App. 820, ¶7, n.3. (2011).
- Entry Into Petitioner's Residence Prohibited Absent a Civil Standby Provision. Law enforcement, as well as respondent, lacked legal authority to enter petitioner's residence to retrieve respondent's items absent a "civil standby" provision in the protection order because respondent was specifically prohibited by the order from entering petitioner's residence. That law enforcement and respondent made no effort to read the court order did not excuse ignorance of its parameters, or an erroneous assumption that it authorized a "civil standby." *Osborne*, at ¶¶52,55 (RCW 26.50 DV order).
- Petitioner May Obtain Civil Standby Provision in RCW 26.50 DV Matter. RCW 26.50.080 authorizes a court when issuing a DV protection order, upon petitioner's request, to order law enforcement to accompany petitioner and assist placing petitioner in possession of all the items listed in the order, or to otherwise assist in the execution of the protection order.

13. Civil Standby Continued

- <u>Respondents and Civil Standby</u>? RCW 26.50 (DV action) does not include statutory authorization for a court to enter a civil standby provision on behalf of a respondent. RCW 10.14 (antiharassment) and RCW 7.92 (stalking) do not include statutory authorization for a court to order law enforcement to conduct a civil standby on behalf of either party.
  - <u>Query</u>? Does a trial court have authority to order law enforcement to conduct a civil standby on behalf of a respondent in a protection order action? [See Paragraphs 3 and 4 above on court's broad discretion and equitable power].

14. Non-Party Victims May Be Included in Protection Order Where Petitioner Has A Duty To Others To Ensure Their Safety

- <u>People With Whom Party Has Duty or Relationship</u>. A party may seek to prevent harassment to self and non-party victims with whom the party has a duty or relationship. But the scope of the order may not exceed the nexus of the relationship. Non-parties may independently petition for protection if necessary.
  - *Trummel v. Mitchell*, 156 Wn.2d 653, ¶22 (2006) (Senior housing complex administrator as a condition of employment, has a duty to ensure safety of tenants, who rightly complain to the administrator when tenants face harassment. A protection order preventing contact with tenants while they are at the complex is permissible. However, an order preventing contact with former tenants, or tenants, employees and staff in any way at any location is too broad because it exceeds the nexus of the landlord/tenant relationship between the administrator and residents.).
  - *Bering v. SHARE*, 106 Wn.2d 212 (1986) (physicians and patients may be protected from harassment while entering and at health care facility).
  - *State v. Noah*, 103 Wn.App. 29 (2000) (psychotherapist's employees and patients may be protected from harassment while entering and at health care facility).

15. Protection Orders May Place Limits On First Amendment Speech As A Time, Place, Manner Restriction

- <u>Purpose of Protection Orders – Focus on the Victim</u>. Protecting citizens from harassment is a compelling state interest. Such statutes are content-neutral. The interest to be served is the safety, security and peace of mind of the victim. Protection orders, narrowly tailored by a focus on the victim, leave open alternative channels of communication so long as no contact is made with the victim, and the proscribed zone is not violated. Thus, protection orders as authorized by statute are appropriate time, place, and manner restrictions which do not constitute an unconstitutional prior restraint of First Amendment rights.
  - *State v. Noah*, 103 Wn.App. 29, 41-42 (2000) (antiharassment statute constitutional).
  - *State v. Bradford*, 175 Wn.App. 912 (2016) (stalking statute constitutional).
- <u>Forcing Offensive Speech on Another is Not Protected Speech</u>. Thrusting offensive and unwanted communication upon another who is unable to ignore it is harassment, and not protected by the First Amendment.
  - *Emmerson v. Weilep*, 126 Wn.App. 930, ¶22 (2005) (Respondent unhappy with investigation performed by code enforcement officer concerning parking violations. Respondent, believing petitioner disclosed respondent's confidential identity to the alleged code violator, screamed at petitioner, calling him a liar and a son of a bitch. Held that trial court properly issued a temporary order, even though full order ultimately denied.).

15. Protection Orders May Place Limits On First Amendment Speech As A Time, Place, Manner Restriction Continued

- Sending Unwanted Material to Another's Home is Not Protected Speech. There is no right to send unwanted material to another's home. The general free speech rule is that the burden is on the viewer to avoid eyes from unwanted speech. One's home is an exception to the general rule. *Trummel v. Mitchell*, 156 Wn.2d 653, ¶28 (2006).

16. Picketing And Free Speech

- Picketing. Lawful exercise of free speech and picketing cannot be a basis for a protection order. But an order prohibiting respondent from harassing petitioner is permitted because anyone else is free to picket petitioner within the geographic distance prohibited of respondent, and respondent is free to picket about petitioner elsewhere. Public discourse goes on, but without the harassing party near the petitioner.
- *State v. Noah*, 103 Wn.App. 29, 43-44 (2000) –
  - Facts. Psychotherapist (Calof) brought defamation action against sister of one patient, and sought antiharassment order against father (Noah) of another patient, relating to sister's and father's protests of psychotherapist's use of recovered memory therapy. Noah's daughter accused him of sexual abuse when she was a child during therapy with another therapist. Noah focused on Calof, who had not treated the daughter. Noah picketed outside Calof's office, entered his office and spoke with a patient, made unsolicited telephone call to Calof's residence, and called Calof's landlord when Calof's lease was up for renewal. As a result, Calof's patients used the office's back door, or cancelled appointments when Noah was picketing. Noah also used cameras and video equipment to photograph Calof, his clients and staff.
  - Trial Court Protection Order Affirmed. Noah restrained from contacting Calof or placing him under surveillance, and prohibited from going within 250 feet of Calof's office or residence. Order amended after contempt hearing to restrain Noah from photographing or videotaping near Calof's building, and prohibited aiding and abetting any person from doing the things prohibited of Noah. The radius was increased from 250 to 300 feet. A second contempt motion was brought. Noah held in contempt for intentionally violating the order. Court of Appeals affirmed protection order and contempt finding.
- Picketing at Abortion and Health Care Facilities. Picketing distance restrictions at health care facilities must be carefully drawn –
  - *Hill v. Colorado*, 120 S.Ct. 2480 (2000) (8-foot zone around person approaching health care clinic upheld).
  - *Schenck v. Pro-Choice Network of Western New York*, 117 S.Ct. 855 (1997) (15-foot buffer upheld).
  - *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) (36-foot buffer upheld).
  - *Bering v. SHARE*, 106 Wn.2d 212 (1986) (Injunction upheld where it prohibited picketing in front of main entrance to medical building, and prohibited all oral use of the words "murder," "kill," and their derivatives when children under 12 were present.).

17. Evicting Respondent From Residence Prohibited Except (1) In Dissolution Action Or (2) Under Separate Eviction Proceeding

- Life Unbearable for Other Tenants (2006). A superior court protection order evicting the respondent from his apartment was affirmed where the trial court concluded that the restrictions were necessary because the respondent's conduct had essentially made living at housing complex unbearable for many of its 160 residents. *Trummel v. Mitchell*, 156 Wn.2d 653, ¶¶4-5 (2006) –
  - Facts. A number of the residents described being alarmed by newsletters written by Trummel and by his placing the newsletters on their apartment doors against their wishes. Residents and staff also chronicled numerous incidents in which Trummel verbally accosted petitioner and other residents, yelling and screaming profanities at them and using terms such as "disgusting runt," "racist," and "diabolical woman." Residents stated they no longer attended resident meetings because of Trummel's disruptive conduct which included yelling during the meetings, taping the meetings, and instigating fights among residents. Residents also stated that Trummel spied on them at night, listening outside their apartment doors. A number of the women residents stated that they no longer felt comfortable entering common areas of the buildings, such as elevators, the laundry room, and the library because they feared encountering Trummel. The record also contained allegations that Trummel repeatedly contacted a staff member's undergraduate school, former professors, and former residences against the staff member's wishes and, with regards to another staff member, contacted the coroner's office after the staff person's aunt passed away. Trummel also delivered letters to other residents in which Trummel demanded that they meet with him (including a 91 year old woman), threatening to report them to criminal authorities if they refused to so do.
- *But See* RCW 10.14.080(8) (Laws of 2011, ch. 307). "The court in granting an ex parte temporary antiharassment protection order or a civil antiharassment protection order, shall not prohibit the respondent from the use or enjoyment of real property to which the respondent has a cognizable claim unless that order is issued under chapter 26.09 RCW or under a separate action commenced with a summons and complaint to determine title or possession of real property."
  - RCW 10.14.080(8) abrogates the *Trummel* holding concerning its distance provision evicting the respondent from his apartment.

18. Government Employees

- Government Employees May Seek Protection. Code enforcement officer entitled to anti-harassment protection order protecting officer where respondent's harassing behavior targeted the officer at work. *Emmerson v. Weilep,* 126 Wn.App. 930 (2005).
- Government Employees Not Statutorily Exempt Against Protection Order. Public school employees are not exempt from antiharassment statute, as statute merely directs court to consider employee's statutory duties in determining whether a lawful purpose existed for the course of conduct. Conduct that is not "reasonably necessary" to fulfill an educator's statutory duties can be harassment. *Shinaberger v. LaPine*, 109 Wn.App. 304 (2001) (Paraeducator could be subject to antiharassment order regarding special education student after paraeducator taunted student and physically blocked student's path.).

19. Consent To Violate Order Is Not A Defense

- Protecting the Public's Interest. An RCW 26.50 DV protection order does not protect merely the "private right" of the person named as petitioner in the order. The statute reflects the legislature's belief that the public has an interest in preventing domestic violence. A victim's repeated invitations and ongoing acquiescence to defendant's presence did not constitute a blanket consent or waiver of the protection order's terms. Allowing consent as a defense to violating a protection order would result in a de facto modification of the order, without notice to all parties and the hearing required by statute before modification of the order. Consent is not a defense to the charge of violating an order for protection. *State v. Dejarlais*, 136 Wn.2d 939, 943-45 (1998) (RCW 26.50 DV order).

20. Attorney's Fees

- Clear Statutory Language Required to Allow Attorney's Fees. Courts decline to award attorney fees under a statute unless there is a clear expression of intent from the legislature authorizing such an award. *In re Freeman*, 169 Wn.2d 664, ¶27 (2010).
- Allowing Respondent's Fees Would Deter Petitioners Access to Courts. Allowing attorney's fees to Respondent who successfully defended against a permanent protection order would deter private parties from seeking temporary and immediate relief from harassment contrary to RCW 10.14.010. *Emmerson v. Weilep*, 126 Wn.App. 930, ¶¶29-31 (2005) (denial of respondent's attorney's fees affirmed).
- Antiharassment – Petitioner's Fees. RCW 10.14.090(2) allows for fees, costs and attorney's fees "to reimburse the petitioner for costs incurred in bringing the action."
  - Petitioner's Renewal or Modification Fees Not Authorized. RCW 10.14.080(5) allows for renewal of an order, and RCW 10.14.180 allows for modification of an order, but neither statute provides for attorney's fees. See *In re Freeman*, below.
- Stalking – Petitioner's Fees. RCW 7.92.100(2)(f) allows for fees, costs and attorney's fees "to reimburse the petitioner for costs incurred in bringing the action." RCW 7.92.130(2) allows for petitioner's costs, fees and attorney's fees" for renewal of an order. RCW 7.92.190(4) allows for costs and attorney's fees "to pay the petitioner for costs incurred in responding to a motion to terminate or modify" an order.
- Domestic Violence – Petitioner's Fees. RCW 26.50.060(1)(g) allows for fees, costs, attorney's fees, and limited license legal technician fees to reimburse petitioner. RCW 26.50.060(3) allows costs, fees and attorneys' fees as authorized by RCW 26.50.60(1)(g) for renewal of an order.
  - Petitioner's Modification Fees Not Authorized. This case concerns neither the seeking nor the renewal of an order. It concerns the modification of one. By omitting a grant of attorney fees from the modification statute, the legislature intended that each party shoulder attorney fees. See RCW 26.50.130. There is no clear expression of intent from the legislature to authorize attorney fees for modification of permanent protection orders. *In re Freeman*, 169 Wn.2d 664, ¶28 (2010) (petitioner's attorney's fees denied).

21. Conduct Found Insufficient – Case Examples

- “No Lawful Purpose” Prohibition Too Broad – Prior Restraint. Antiharassment order was an unconstitutional prior restraint on speech where order restrained former wife from “knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming [former husband] and for no lawful purpose.” *In re Suggs*, 152 Wn.2d 74 (2004).
- Threat To Sue. In public disclosure action, stating to city clerk “you better do this,” “look this up,” and “if you don’t do this just right, I’m gonna sue ya,” did not constitute harassment. Requesters conduct was not directed at the city clerk personally, but instead served a legitimate purpose of achieving lawful disclosure of public documents. *Zink v. Mesa*, 140 Wn.App. 328 (2007).

22. Conduct Found Sufficient – Case Examples

- History of Showing Up at Victim’s Residence; Telephone; Text. Stalking conduct proven where respondent had a history of showing up late at victim’s door, breaching window to reach her, contacting victim by telephone and text, causing victim to install security camera, become reclusive, and end almost every relationship she had because she felt she was putting other people she knew in danger. *State v. Whittaker*, 192 Wn.App. 395 (2016).
- Residence; Violence; Threats to Commit Suicide and to Kill. Domestic violence proven where respondent appeared uninvited at ex-husband’s (and new wife’s) residence, pounded on wall of home, demanded ex-husband come outside, was involved with physical altercation with new wife, and told ex-husband’s sister that respondent was going to shoot ex-husband and new wife, and then kill herself. *Hecker v. Cortinas*, 110 Wn.App. 865 (2002).
- Trying to Spook Cattle. Continuing course of conduct with intent to harass where rancher drove his cattle along common roadway two or three times per month, and respondent would routinely drive up in pickup, honking its horn, or with the radio blaring, or park the pickup and start running a weed whacker, all in an alleged attempt to spook the cattle. *Ledgerwood v. Lansdowne*, 120 Wn.App. 414 (2004).
- Targeting New Boyfriend; Contacting Victim’s Employer. Entire course of conduct, including letters to victim’s employers accusing him of being involved in pornographic and racist websites, and threatening letters to victim, who had become romantically involved with defendant’s ex-girlfriend, placed victim in reasonable and actual fear of injury to his livelihood and reputation. *State v. Askham*, 120 Wn.App. 872 (2004) (felony harassment and stalking convictions affirmed).
- Offer of Small Claims Settlement in Violation of No Contact Provision – Get Court Permission First. Due process right of access to courts did not protect small claims court claimant as to settlement demand letter sent in violation of antiharassment order. Where interest of one party in being free from contact with the other pursuant to antiharassment order or other similar order conflicts with interest of other party in pursuing legal claim, proper solution is for party pursuing legal claim to seek permission from court which issued antiharassment order to modify order to allow appropriate action. *Seattle v. Megrey*, 93 Wn.App. 391 (1998) (violation of court order conviction affirmed).