

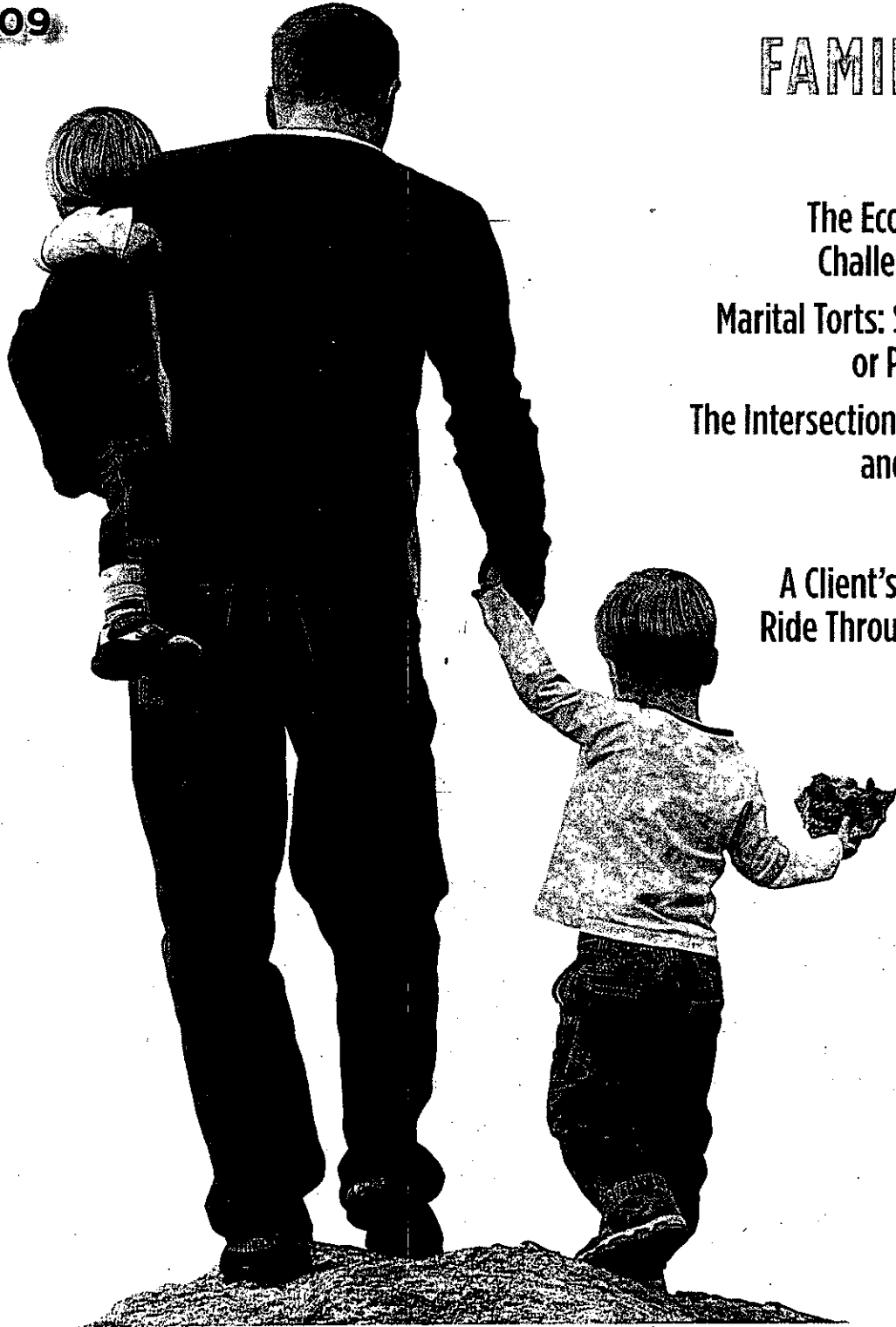


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FAMILY LAW

Inside

**The Economy and the
Challenge for Justice**

**Marital Torts: Spousal Rights
or Pandora's Box?**

**The Intersection of Family Law
and Criminal Law**

Plus

**A Client's Roller Coaster
Ride Through the System**

Domestic Violence Actions: The Intersection of Family Law and Criminal Law

by Elise Morgan Whitley and John C. Vermitsky



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Defending domestic violence actions brought under Chapter 50B of the North Carolina General Statutes requires knowledge of both family law and criminal law. What occurs in these "quasi-criminal" actions has a lasting effect on a variety of areas of law, including Chapter 50 domestic actions and criminal actions.

Domestic Violence Issues from a Family Law Perspective *Know the Statute*

It is crucial for family law practitioners to review Chapter 50B every time they handle a domestic violence matter. The statute is short, but full of information, including definitions, remedies, and procedure. Domestic violence includes but is not limited to physical abuse. The statute defines "domestic violence" as attempting to cause bodily injury, intentionally causing bodily injury, placing the aggrieved party or a member of the party's family or household in fear of immediate serious bodily injury, or harassment as defined by the criminal stalking statute. Also included in the definition are the acts defined by the criminal statutes as first- and second-degree rape.

The trial court must find as a fact that the moving party actually feared imminent serious bodily injury for purposes of the domestic violence statute. Case law holds that the statute "imposes a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred."¹ *This point is crucial.* The reasonable person we learned about in law school has no place in the domestic violence statute.

In order to be covered under the domestic violence statute, some type of "personal relationship" must exist between the parties. Those personal relationships are defined by the statute and include current or former spouses, persons of the opposite sex who live together or have lived together, relatives (to a certain degree), persons with a child in common, and persons in a dat-

ing relationship. The statute defines "dating relationship" to require something more than a casual acquaintance or a one-time sexual encounter. Persons in same-sex relationships, by implication, are afforded no protection under the statute unless they "are current or former household members."

What can a domestic violence protective order do? It might be easier to ask what it cannot do. Section 50B-2 lists the twelve specific powers and one "catch-all" power available to the court in 50B actions—and these powers are vast. Domestic violence protective orders can do a myriad of things, including but not limited to: (1) evicting the defendant from the home; (2) awarding temporary custody of minor children to the plaintiff; (3) ordering the defendant to make temporary child support and/or spousal support payments; (4) providing for possession of personal property such as cars; and (5) awarding attorneys' fees.

Know the Parties and Witnesses

There is nothing more frustrating than learning about your client's criminal record on cross-examination. Ask your client if he or she has a criminal record, and then run a criminal and civil record check just to be on the safe side. If the plaintiff has an attorney, that attorney will be running your client's record, and you need to know what they know. While you are running your client's criminal and civil records, do not forget to run criminal and civil record checks on the plaintiff and witnesses, too. It is also advisable to have your client prepare a written narrative of the events that are the subject matter of the domestic violence complaint. Writing things out will slow the client down and often lead him or her to remember previously undisclosed details.

Deal with Custody and Support Issues on Two Fronts

Here is a typical 50B situation: The plaintiff files a domestic violence action alleging domestic

violence and an *ex parte* order is entered. In that *ex parte* order, the plaintiff is granted temporary custody of the children and the defendant is evicted, ordered to pay temporary child support, and prohibited from communicating with the children. What do you do? File your Chapter 50 child custody and child support action and schedule a temporary hearing ASAP!

Before the ten-day "return" hearing, have a Chapter 50 action pending and a temporary child custody and child support hearing scheduled. Prepare your subpoena *ad testificandum* and subpoena *duces tecum*, and have the plaintiff served with the subpoenas at an appropriate time on the hearing date. If the opposing party is employed outside of the home, prepare and serve your employer wage affidavit. If your client is employed outside of the home, begin gathering the necessary tax return information and get an employer wage affidavit completed.

At the ten-day hearing, make use of the courtroom deputy by having the deputy serve the plaintiff with the summons, complaint, notices of hearing, and subpoenas. Notify the court at the hearing that there is a pending Chapter 50 action and that hearings are scheduled on the issues of child custody and child support (and any other relevant issues). Many judges dislike making custody provisions in domestic violence actions; Chapter 50 custody actions allow the court more time to consider evidence and argument in making a custody determination.

Section 50B-2 limits the circumstances in which an *ex parte* order may deal with temporary child custody only to those situations in which there is a finding that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse. If the court finds that domestic violence has occurred, a domestic violence protective order is entered.

Section 50B-3 details the types of relief to which a party is entitled concerning temporary custody. It is imperative to remember that any temporary custody order entered under 50B is *without prejudice* and limited in duration to no more than one year. Chapter 50 custody determinations are made *de novo* (but do not

forget about collateral estoppel problems, discussed in depth below). Any subsequent custody order entered under Chapter 50 supersedes a temporary order issued pursuant to Chapter 50B.

When you get to your Chapter 50 domestic action, N.C.G.S. § 50-13² requires that the court consider all relevant factors in reaching a custody determination, including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. If the court finds that domestic violence has occurred, it is compelled by statute to enter an order that best protects the children and the party who were the victims of domestic violence.

Deal with Property Issues/Equitable Distribution on Two Fronts

If the plaintiff and defendant are married, there likely will be equitable distribution issues to consider. As part of the AOC domestic violence protective order forms, the plaintiff can request and the trial judge can order that the plaintiff receive sole and exclusive use of vehicles, real property, and household contents. For many people, that is the extent of their marital estate. So what do you do if the plaintiff is asking for all of the assets at the ten-day hearing? If you plan on filing an equitable distribution lawsuit, file it before the ten-day hearing, then advise the court that there is a pending equitable distribution action. If you are seeking any of the personal or real property that was ordered to go to the plaintiff, file and notice an interim distribution motion.

Collateral Estoppel Is Real: Findings in a 50B Action Will Haunt or Help a Chapter 50 Action

The doctrine of collateral estoppel bars a party from re-litigating issues of domestic violence when a determination on those identical issues was made in a 50B action. The 2006 case of *Doyle v. Doyle* deals with this issue in depth.² Collateral estoppel means that

a final judgment on the merits prevents relitigation of issues actually liti-

gated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.³

If the court determines in a 50B action that an alleged incident constitutes domestic violence, then you likely are stuck with that conclusion in your Chapter 50 action, except only insofar as the 50B order also is a temporary custody order (which is "without prejudice"). A finding of domestic violence *must* be considered by the court in the Chapter 50 custody action,⁴ and it can constitute "marital misconduct"⁵ for the purposes of post-separation support and alimony.

Appeals

Generally, cases cannot be appealed if they are moot, as when "events occur during the pendency of the appeal which cause the underlying controversy to cease to exist."⁶ However, even though a domestic violence protective order may expire during an appeal, the general mootness doctrine would not apply:

[E]ven when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.⁷

One instance in which a defendant suffers collateral legal consequences as a result of the entry of a domestic violence order occurs when the order is considered by the court in a custody action involving the defendant. In addition, there are numerous non-legal consequences of the entry of a domestic violence protective order that render expired orders appealable. For example, "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a domestic violence protective order."⁸ In sum, the stigma attached to a person who has been found to have committed domestic violence long outlives the term of the domestic violence protective order

itself. Remind the court of the effect that a domestic violence protective order will have on your client and his or her ability to work and advance in the future.

Know Your Judge and Know When to Seek a Continuance

The most important rule in trial practice is to know your judge, and this is especially true in domestic violence actions. What is the judge's background? Was he or she a D.A.? Criminal defense attorney? Social worker? Ask other lawyers how the judge has handled domestic law cases in the past. This information will be crucial in making an informed decision about when and how to try your client's case.

Criminal Defense Considerations in a 50B Hearing

The Ex Parte Continuance

Chapter 50B provides for two different types of domestic violence protective orders: (1) the ten-day *ex parte* order and (2) the permanent protective order. The first is an order entered by a judge upon the testimony of only one party, with or without the other party's knowledge.⁹ An order of this type is effective for ten days and has all the force and effect of a normal domestic violence protective order. It ends of its own accord within ten days if not continued by the order of a district court judge. As a practical matter, this means that a hearing will be set upon the granting of an emergency *ex parte* order to determine whether the order will be extended or modified by the entry of a permanent domestic violence protective order.

This is where things can get tricky. Often (and it seems more often than not), the conduct complained of in the 50B application gives rise to criminal charges.¹⁰ However, very rarely will a first appearance for these charges be set for the same day as the ten-day hearing and, frequently, it will be set for a month or more afterwards. In these cases, the trend seems to be for judges to continue the 50B hearing to the date of the criminal charges in order to "do them all together." But be careful. Before consenting to such a continuance, it is important to stop and think whether that is really in the best interests

of the client. *This type of continuance is not expressly permitted by statute and often is not in the client's best interests!* Here are a few reasons why.

First, most people who take out 50Bs are not represented by legal counsel. Unlike with criminal charges, the alleged

[W]hen the criminal allegations are tied to the 50B hearing . . . it often causes the judge to allow irrelevant or inadmissible evidence into the proceedings.

victim will not necessarily be represented by an attorney who would have subpoena powers, know the rules of evidence, or have the legal background to vigorously prosecute a 50B action. However, if the 50B is tried together with the criminal charges, all of this will change: The district attorney on the other side will be prosecuting your client for the conduct that underlies the 50B action. The district attorney has subpoena powers, access to other witnesses, and often a familiarity with the district court judge, which could hinder a favorable verdict for your client. Worse, if the judge decides that your client has committed a crime, the judge will be legally bound (because of the higher burden of proof for the criminal charge) to grant the domestic violence protective order as well. And allowing the opposing party time to reflect on the incident often makes him or her more likely to hire a lawyer and prepare any additional evidence against your client for trial. This evidence could be in the form of voice-mails, pictures, letters, emails, or other items that otherwise might not have been collected or produced by the alleged victim in the ten-day period.

Consider also that once a 50B has been tied to criminal allegations, it will stay with the criminal allegations until they are resolved. This can mean that the 50B will be continued a number of times for a number of months while the state subpoenas police officers and witnesses or the court unclogs an overcrowded docket.

Since Chapter 50B says that a domestic violence protective order stays in place for up to one year from the date of its entry, the combination of a continued *ex parte* order and a final domestic violence protective order could have the functional effect of subjecting your client to a 50B

order for eighteen months or more.

In addition, allowing a 50B and criminal charges to be tried together encourages judges to take the role of Solomon and "split the baby" in close cases. For example, a judge may find your client not guilty on the criminal charge, but give the alleged victim some relief in the form of a 50B protective order. This allows the judge to create "compromises" in close cases without receiving a backlash from the alleged victim and domestic violence interest groups.

Last, and perhaps most importantly, when the criminal allegations are tied to the 50B hearing, it may become difficult to determine which facts are specific to which matter. This can result in a confusion of the issues, and often causes the judge to allow irrelevant or inadmissible evidence into the proceeding. Consider the following example:

Joe Smith's ex-wife Jane takes out a 50B against him for threatening her by saying that "she would get hers someday" when he was dropping off their children with her for visitation. Jane alleges that later that night, Joe returned to the house that she had left and broke into her car to steal several items from her glove compartment. Joe is charged with assault, breaking and entering, and destruction of personal property. However, only the assault is relevant to the 50B.

The 50B hearing is continued and consolidated with the criminal matter.

At the trial, the district attorney seeks to introduce evidence that Joe used a sledgehammer to break open the car window and then took all of Jane's prescription medications so that she would not have the drugs she needed to cope with her severe anxiety. The defense attorney objects to the introduction of this evidence claiming it is irrelevant to the 50B, but the objection will be overruled because the evidence is relevant to the criminal charges.

Now, instead of the judge seeing Joe as a man who made a rude comment to his ex-wife ("you'll get yours someday"), the judge sees Joe as a man who breaks into cars with sledgehammers to steal drugs from his ex-wife. Importantly, breaking and entering and stealing the drugs, though criminally actionable, are probably insufficient in and of themselves to qualify as an act of domestic violence that would subject Joe to a 50B protective

order and are therefore irrelevant. If the cases had been kept separate, Joe might very well have won the 50B even if he had lost his criminal trial.

Despite all this, there are occasions when one will want to combine a 50B with a criminal action. For example, if the court date for the criminal matter has a more favorable judge, putting the cases together can be a quick and effective way of getting a free continuance and doing some judge-shopping. Also, postponing the 50B can give the alleged victim some "cooling off time" to think about the consequences of the 50B and perhaps to decide to drop the matter entirely.

However, the question remains: How does one prevent the plaintiff or judge from continuing the case without the defendant's consent? This can be very difficult, especially since an appeal from the granting of a motion to continue is quickly rendered moot (before any appeal can be perfected) and may even be interlocutory.

One tactic that has been successful is the strict interpretation of the statute itself. Section 50B-2(c) states:

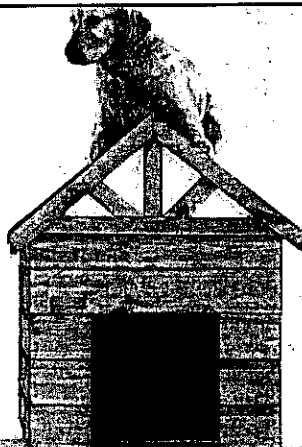
Upon the issuance of an *ex parte* order under this section, a hearing shall be held within ten days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later.¹¹

The key language here is that a hearing **shall be held** within ten days. The statute does not say a hearing shall be *set*, it says a hearing actually shall be *held*, and a motion to continue, by its very nature, continues the hearing such that one cannot be *held*.

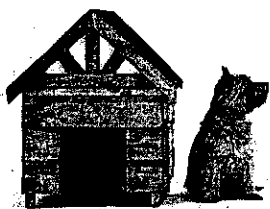
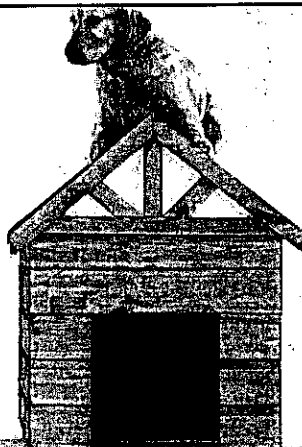
If all else fails, ask the judge to terminate the *ex parte* order pending the criminal matter. This would at least free your client from some restrictions while awaiting trial on the criminal charges.



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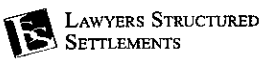
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Violation of a 50B Order

In addition to these immediate criminal defense considerations, being the subject of a 50B domestic violence protective

order can have significant criminal consequences in the future. For one thing, the knowing violation of any aspect of a valid protective order is a Class A1 misdemeanor that can subject a defendant to up to 150 days in jail (if a level 3 offender).¹² This punishment applies for a violation of *any condition* of a 50B, not just when a client actually threatens, harasses, or contacts the alleged victim. This can be especially problematic due to the broad nature of the conditions that can be ordered pursuant to a 50B order.

This broad grant of authority gives judges almost limitless discretion to impose conditions upon a defendant in a 50B order. In some jurisdictions, judges will impose a multitude of conditions (e.g., drug treatment, reporting, domestic violence and anger management classes, finishing a GED or educational requirements, getting a job) that are very easy to violate. Unfortunately, each violation of any of these conditions can be charged as a separate misdemeanor. To make matters worse, the second violation of a 50B now subjects the violator to a Class H felony, which can carry a sentence of up to thirty months in prison.¹³

Furthermore, a 50B also can be used to aggravate a separate felony committed by the person subject to the protective order. Section 50B-4.1 provides that:

[A] person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order . . . shall be guilty of a felony one class higher than the principal felony described in the charging document.¹⁴

Thus, a Class E felony with a maximum sentence of 98 months can become a Class D felony with a maximum sentence of 229 months.

violation of a “qualifying Protection Order”¹⁸ (a 50B is a “qualifying Protection Order” under federal law).

All of these crimes are punished based on the amount of bodily injury done to the victim, and punishments can range from five years to life in prison.¹⁹

The crimes punishable under the Gun Control Act (all felonies) include:

- the possession of a firearm and/or ammunition while subject to a “qualifying Protection Order”;²⁰
- the possession of a firearm and/or ammunition after conviction of a qualifying misdemeanor crime of domestic violence.²¹

Each of these crimes carries a maximum sentence of ten years in prison, and can subject the defendant to restitution for any injuries suffered by the victim.

Remember also that testimony and/or evidence admitted in a civil domestic violence protective order hearing may be available for use by the federal government in pursuing federal charges against an individual. Likewise, consent to a 50B domestic violence protective order is a tacit admission of the underlying domestic violence offense, which can subject the individual to the federal penalties listed above and lead to serious immigration consequences.

Immigration Consequences of 50Bs

First, it is important to note that the current immigration code is incredibly complex and difficult to decipher. It is imperative that an attorney understand the consequences of a domestic violence protective order being issued against a client. This is especially important in the realm of permanent residents, as a green card application can be rejected if the individual applying for it is on the receiving end of a domestic violence protective order.²²

One of the reasons these protective orders are so dangerous is that “crimes of domestic violence” are a special category of crimes in the immigration code;

[A] broad grant of authority gives judges almost limitless discretion to impose conditions upon a defendant in a 50B order . . . that are very easy to violate.

Remember that the alleged victim of a 50B often has extreme animosity towards the accused and will try to allege that he or she violated the terms of the order, whether or not this is true. These allegations, if believed by a judge, can lead to serious jail time for your client.

Federal Law and 50Bs

In 1994, the United States Congress passed legislation aimed at “empowering the federal government to participate in the fight against domestic violence.”¹⁵ This legislation, which was part of the Crime Bill, became known as the Violence Against Women Act (VAWA). The Act created a number of federal crimes related to protective orders and subjected the violators to strict criminal punishment in federal court. Congress also passed changes to the Gun Control Act that criminalize firearm offenses by persons subject to a domestic violence protective order.

The crimes punishable under VAWA (all felonies) include:

- crossing state lines or entering or leaving Indian Country to physically injure an “intimate partner”;¹⁶
- crossing state lines to stalk or harass within the maritime or territorial lands of the United States¹⁷ (anyone subject to a 50B who enters North Carolina from another state potentially would be guilty of this crime);
- crossing state lines or entering or leaving Indian Country in

if a permanent resident or undocumented immigrant receives one of these convictions, it is grounds for deportation. INA 237(a)(2)(E) states that:

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

This is especially tricky in the 50B context, because in the immigration laws, the term "conviction" encompasses both formal convictions as well as a defendant's factual admissions on the record to a set of facts that would support finding that person guilty of a crime of domestic violence. Thus, it is very important that an attorney first inquire as to the immigration status of a client before allowing the client to consent to a 50B domestic violence protective order; otherwise, the client could inadvertently consent to a domestic violence conviction that would render the person deportable under federal law.

In addition, aliens who *violate* existing domestic violence protective orders likewise are subject to deportation. INA 237(a)(2)(E) goes on to state that:

Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct

that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendent lite order in another proceeding.

If an alien commits multiple violations of a domestic violence protective order or the violation constitutes a crime of violence, the alien can be rendered "inadmissible" as well as "deportable."²³ The distinction is important: An alien who is merely deportable can only be removed from the country, while an alien who is rendered inadmissible will be deported, be denied future entrance, and be subject to lengthy prison sentences if he or she attempts to reenter the country illegally.

Recall that it is often quite easy for persons to be found guilty of violating a 50B order due to the wide range of conditions judges can impose as part of that order. This means that 50Bs are extraordinarily dangerous for any alien client, legal or otherwise. The moral of the story is that when in doubt, the attorney should call an immigration specialist to help muddle through the immigration consequences of a 50B.

Actions brought under Chapter 50B of the North Carolina General Statutes remain some of the least understood civil actions attorneys face in North Carolina today. These orders can be extremely dangerous for the clients involved, and they can have long-lasting criminal effects on the persons who are subject to them. Fortunately, by understanding the law and the criminal consequences of these orders, attorneys can successfully lessen their impact on their clients. ♦

1. *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999).
2. *Doyle v. Doyle*, 176 N.C. App. 547, 626 S.E.2d 845 (2006).
3. *Id.* at 549, 626 S.E.2d 848.
4. See N.C.G.S. § 50-13.2.
5. See N.C.G.S. § 50-16.1A.
6. *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 549 S.E.2d 912 (2001).
7. *Id.* at 436, 549 S.E.2d at 914.
8. *Id.* at 437, 549 S.E.2d at 914.
9. N.C.G.S. § 50B-2(c).
10. Some of the most common charges of this nature include *inter alia*: Assault, Assault on a Female, Assault by Strangulation, Trespass, Domestic Criminal Trespass, Injury to Personal Property, Injury to Real Property, Stalking, Communicating Threats, and Harassing Phone Calls. Note: If your practice includes criminal defense and you see any of the above charges, it is imperative that you investigate whether a 50B civil complaint also has been taken out against your client.
11. N.C.G.S. § 50B-2(c) (1979).
12. N.C.G.S. § 50B-4.1(a).
13. N.C.G.S. § 50B-4.1(f) (2008) (2008 N.C. Sess. Laws 93, two violations for offenses committed on or after December 1, 2008, but three violations for offenses committed prior to December 1, 2008).
14. N.C.G.S. § 50B-4.1(d).
15. Margaret S. Groban, *The Federal Domestic Violence Laws and the Enforcement of These Laws*, MINNESOTA CENTER AGAINST VIOLENCE AND ABUSE, available at <http://www.mincava.umn.edu/documents/ffc/chapter5/chapter5.htm>.
16. 18 U.S.C. § 2261 (1994).
17. 18 U.S.C. § 2261A (1994).
18. 18 U.S.C. § 2262 (1994).
19. Note that under VAWA, the court must order restitution to pay the victim the full amount of losses, including *inter alia*: medical bills, physical therapy, transportation, temporary housing, child care expenses, lost income, attorney fees, etc.
20. 18 U.S.C. § 922(g)(8).
21. 18 U.S.C. § 922(g)(9).
22. For more information on this and other immigration issues, contact a member of the NC Advocates for Justice who specializes in immigration law at www.ncaj.com. (Note: Special thanks in this section is due to Ms. Helen Jugovic, an associate with The Chapman Law Firm in Greensboro, North Carolina.)
23. For more on the distinction between "inadmissibility" and "deportability," see a local immigration specialist.