

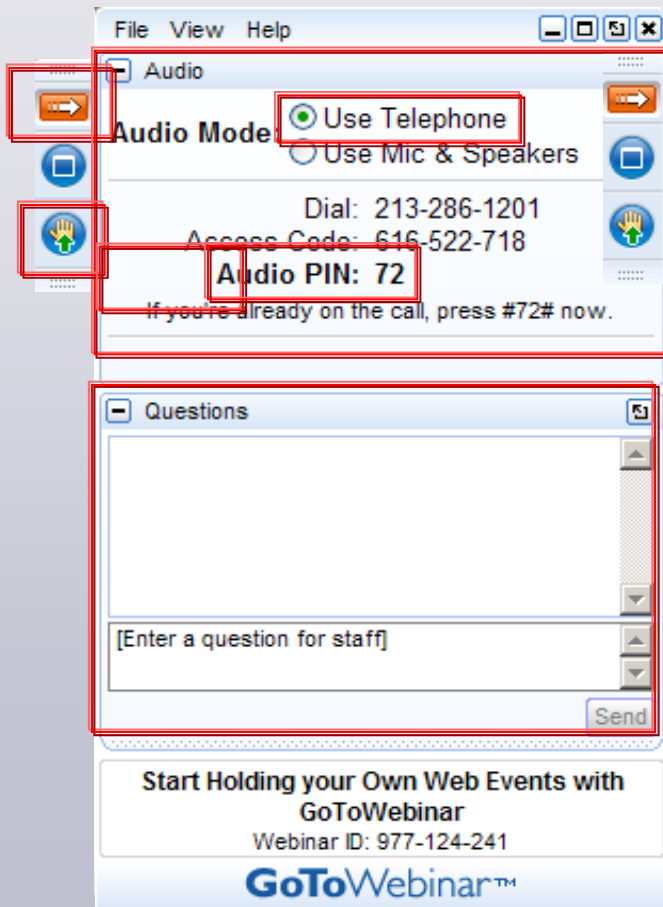
# **VAWA ITWG WEBINAR: PROTECTION ORDERS PART I**

**Tuesday, May 6, 2014**



**Intertribal Technical-Assistance Working Group on  
Special Domestic Violence Criminal Jurisdiction**

# HOW TO PARTICIPATE TODAY



- Open and close your Panel
- View, Select, and Test your audio
- Submit text questions
- Raise your hand
- Q&A Recorded webinar will be made available

# VAWA ITWG WEBINAR:

## PROTECTION ORDERS PART I:

### CRAFTING, SERVING, AND ENFORCING PROTECTION ORDERS

Tuesday, May 6, 2014

**PANELISTS:**

**Rob (Roberta) Valente**, Policy Consultant, National Domestic Violence Hotline

**Hon. Kelly Gaines Stoner**, Judge, Seminole Nation; Victim Advocacy Legal Specialist, Tribal Law & Policy Institute

**Hon. Steven Aycock**, Judge-in-Residence, National Council of Juvenile and Family Court Judges (*unable to join us on today's webinar due to illness*)

**FACILITATORS:**

National Congress of American Indians  
Tribal Law & Policy Institute



# VAWA ITWG WEBINAR:

## PROTECTION ORDERS PART I

Tuesday, May 6, 2014

### Our Focus Today:

- Short overview of VAWA 2013 as it pertains to protection orders
- Looking Ahead: Crafting a Protection Order with VAWA 2013 in mind
- Firearms: and Strengthening the Order
- Issue and Enforce

# VAWA SECTION 904: TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE

- Section 904 of the re-authorization of the Violence Against Women Act (VAWA) of 2013 makes several amendments to the Indian Civil Rights Act (ICRA) of 1968.
- Most notably, it authorizes tribes to exercise “special domestic violence criminal jurisdiction” over non-Indians.
  - A “participating” tribe is a tribe that has opted to exercise this special domestic violence criminal jurisdiction.

# WHAT VAWA SECTION 904 COVERS



- A participating tribe may exercise “special domestic violence criminal jurisdiction” over a non-Indian defendant for
  - Acts of domestic violence or dating violence that occur in the Indian country of the participating tribe; and
  - Violations of Protection Orders that are violated in the Indian country of the participating tribe.

# VAWA SECTION 904 DEFINITIONS:

## *DATING AND DOMESTIC VIOLENCE*

- **Dating Violence** – “violence committed by a person who is or has been in a **social relationship of a romantic or intimate nature** with the victim, **as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.**”
  - Note: This definition would *NOT* likely be interpreted to cover a single “hook-up”.
- **Domestic Violence** – “violence committed by a current or former **spouse or intimate partner** of the victim, by a person with whom the victim **shares a child** in common, by a person who is **cohabitating with or has cohabitated with the victim as a spouse or intimate partner**, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country *where the violence occurs.*”



# VAWA SECTION 904 DEFINITIONS:

## *PROTECTION ORDER*

- “any injunction, restraining order, or other order issued by a civil or criminal court ***for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;*** and
- includes any temporary or final order issued by a civil or criminal court, ***if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.***”



# REQUIREMENTS IN ORDER TO CRIMINALLY PROSECUTE FOR VIOLATION OF PROTECTION ORDERS UNDER VAWA § 904


- Special Domestic Violence Criminal Jurisdiction over violation of protection orders applies **only** if the violation is of the portion of the protection that
  - *Protects against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;*
  - *Was issued against the defendant;*
  - *Is enforceable by the participating tribe; and*
  - *Is consistent with 18 U.S.C. § 2265(b), governing Full Faith and Credit given to Civil Protection Orders*
    - *Includes jurisdictional and notice requirements*

# WHAT VAWA 2013 SECTION 904 DOES NOT COVER

- Victim and Defendant are both non-Indian - A tribe may not exercise special domestic violence criminal jurisdiction if neither the defendant nor the alleged victim is an Indian.
- Non-Indian Defendant Lacks Sufficient Ties to the Indian Tribe – Defendant must either
  - Reside in the Indian country of the participating tribe;
  - Be employed in the Indian country of the participating tribe; or
  - Be a spouse, intimate partner, or dating partner of a tribal member, or an Indian who resides in the Indian country of the participating tribe.
- The crime did not take place in the Indian Country of a participating tribe
- Tribe chooses not to exercise this VAWA 2013 section 904 jurisdiction

## CLARIFYING FULL TRIBAL CIVIL JURISDICTION TO ISSUE AND ENFORCE TRIBAL PROTECTION ORDERS AGAINST *ALL PERSONS*

- Section 905 of VAWA Title IX fulfills the intent of VAWA 2005 regarding tribal civil jurisdiction to issue protection orders.
- VAWA 2005 intended for tribes to have full civil authority to issue and enforce protection orders against Indians and non-Indians alike. Unfortunately, at least one federal court has suggested that tribes lack civil jurisdiction to issue and enforce protection orders against non-Indians who reside on tribal lands. That ruling undermines the ability of tribal courts to protect victims.
- Section 905 of VAWA Title IX carries out the congressional intent of VAWA 2005 by clarifying that every tribe has full civil jurisdiction to **issue** and enforce protection orders ***against all persons*** regarding **matters arising on tribal lands**, and that such orders are entitled to full faith and credit by non-tribal jurisdictions.

The left side of the slide features a series of vertical stripes in various shades of blue and grey. Overlaid on these stripes are several circles of different sizes in a solid teal color. One large circle is positioned near the top, with several smaller circles scattered below it, creating a modern, abstract design.

# TLOA and VAWA Provisions and Due Process Requirements and other Limitations

# LIMITATIONS ON UTILIZING TLOA ENHANCED SENTENCING AND/OR VAWA CRIMINAL JURISDICTION

Limitations	TLOA	VAWA
<u>Particular Offenses Only:</u> Defendant must either (1) previously have been convicted of same or comparable offense by any jurisdiction in U.S.; or (2) is being prosecuted for a “felony” (an offense that would be punishable by more than 1 year imprisonment if prosecuted by U.S. or any of the States).	✓	
<u>Particular Offenses Only:</u> Defendant must be prosecuted for either (1) domestic violence, (2) dating violence, or (3) violation of a protection order.		✓
<u>Particular Defendants Only:</u> Defendant must have sufficient ties to the community, which could be either (1) residence on the reservation, (2) employment on the reservation, or (3) a relationship with a tribal member or Indian resident.		✓

# DUE PROCESS PROTECTIONS REQUIRED BY TLOA AND/OR VAWA

TLOA and VAWA Due Process Requirements		TLOA	VAWA
1.	Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.*	✓	✓
2.	Tribal government provides, at their expense, to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.*	✓	✓
3.	Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*	✓	✓
4.	Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.*	✓	✓
5.	Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants are licensed to practice law by any jurisdiction in the United States.*	✓	✓

\*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.

TLOA and VAWA Due Process Requirements		TLOA	VAWA
6.	The tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.*	✓	✓
7.	Tribal court maintains a record of the criminal proceeding, including an audio or other recording.*	✓	✓
8.	Any defendant sentenced to greater than 1-year imprisonment to be served in a tribal facility, that facility must pass the BIA jail standards for long-term incarceration.	✓	
9.	Tribal court provides the defendant the right to a trial by an impartial jury.		✓
10.	Tribal court ensures that the jury pool reflects a fair cross section of the community.		✓
11.	Tribal court ensures that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.		✓

\*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.



TLOA and VAWA Due Process Requirements		TLOA	VAWA
12.	Tribal court ensures that anyone detained under the special domestic violence criminal jurisdiction is “timely notified” of his/her rights and responsibilities.		✓
13.	Tribal court ensures that a defendant is notified of their right to file “a petition for a writ of <i>habeas corpus</i> in a court of the United States.”		✓
14.	Tribal court ensures that “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant” are provided.		✓
15.	Tribal court ensures that “all applicable rights under the special domestic violence criminal jurisdiction provisions” are provided.		✓

# PROTECTION ORDERS

- Sets forth clear commands from the Court
- Issued with victim safety in mind
- Set parameters of acceptable behavior for the batterer as determined by the Court
- Takes some power and control away from the batterer

# LANGUAGE IS IMPORTANT BECAUSE....

- May determine whether other jurisdictions are mandated by federal law (VAWA) to give full faith and credit to the order
- May trigger the Federal Firearms prohibition against possessing ammunition or firearms during the period of a valid Protection Order
- Any violation may be the basis for a criminal prosecution of Indians and/or non-Indians (VAWA 2013)
- May form jurisdictional basis for custody (filing under the Uniform Child Custody Jurisdiction Enforcement Act)
- May engage a presumption of custody to non-violent parent

# VAWA FULL FAITH AND CREDIT LANGUAGE

- The court has subject matter jurisdiction over the case
- The court has personal jurisdiction over the parties
- Reasonable notice and opportunity to be heard has been given the defendant/respondent
- No cross or counter-petition for a protection order unless by written pleadings filed in the case
- No cross or counter-petition for a protection order granted unless the court make specific findings explaining why each party is entitled to a protection order

# MUST PRESENT EVIDENCE

- Subject matter jurisdiction
- Personal jurisdiction
- Notice and opportunity to be heard
- Relationship
- Elements of the violation or crime:  
what happened guided by elements  
of code
- Present facts/evidence that support  
the relief you are requesting

YOU MAKE THE CALL

# SUBJECT MATTER?

## **IN THE DISTRICT COURT OF THE DEER NATION**

THIS COURT has reviewed the Petition for Domestic Abuse Protection Order and Motion for Temporary Protection Order in this case. This Court has subject matter and personal jurisdiction over this matter.

It is hereby ordered that...



# SUBJECT MATTER AND PERSONAL JURISDICTION??

- This court has jurisdiction to issue this protection order as the parties are married, reside within the jurisdiction of the Deer Nation, the petitioner is non-Indian and the Respondent is a member of the Deer Nation (DNTC 1-213). Both parties reside within the jurisdictional boundaries of the Deer Tribe and the Petitioner is employed by the Deer Tribe. (DNTC 1-215). The acts of violence occurred within the jurisdictional boundaries of the Deer Nation. (DNTC 1-218)

# ARE YOU THINKING AHEAD??

- Do you approach obtaining the protection order and the importance of the language in the protection order as the possible basis for a criminal violation?
- Commands of the Court must be specific.
- Violation of protection orders that
  - *Protects against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;*
- The violation must be proven beyond a reasonable doubt.
- No second chances- must be drafted to cover all areas.
- Do not be afraid to request that forms be modified to include critical language.

# QUESTIONS AND ANSWERS

# FIREARMS AND TRIBAL COURTS

**Rob (Roberta) Valente**

**Consultant**

# A QUICK REVIEW OF FEDERAL FIREARMS LAWS

- Persons subject to a qualifying protection order may not possess or purchase firearms or ammunition (18 U.S.C. 922(g)(8))
- Persons convicted of a misdemeanor crime of domestic violence may not possess or purchase firearms or ammunition (18 U.S.C. 922(g)(9))
- ATF enforces federal firearms law (search/seizure)
- FBI maintains critical databases (NCIC, NICS)
- U.S. Attorneys prosecute federal firearms law violations (in federal District Court)

# DOMESTIC VIOLENCE FIREARMS OFFENSES: PROTECTION ORDERS

- 18 U.S.C. §922(g)(8)
- It is a federal crime to possess a firearm and/or ammunition if subject to a qualifying protection order
- Prohibition lasts for duration of protection order
- Official use exemption for law enforcement and military personnel; firearms must be checked in and out with supervisors and left at work when off duty

# WHAT IS A “QUALIFYING” PROTECTION ORDER FOR PURPOSES OF § 922(G)(8) (CIVIL)?

## Basic Requirements:

- Relationship
- Due Process
- Terms of the Order
- Finding of a Credible Threat OR Express Prohibition on Conduct

Note: “Qualifying” is not in the text of the statute.



# RELATIONSHIP REQUIREMENT (CIVIL)

## Under 18 U.S.C. §921(a)(32)

### the protected party must:

- be a spouse or former spouse;
- cohabit or have cohabited with respondent;
- have a child in common;
- be the child of the intimate partner OR
- be respondent's child.

\*Relationship requirement is different than that required under g(9)

# DUE PROCESS REQUIREMENT (*CIVIL*)

The order must have been entered after a hearing of which respondent had actual notice and an opportunity to be heard.

(18 U.S.C. §922 (g)(8)(A))



## ✓ ONE FROM COLUMN A

### *Ordered to refrain from:*

- harassing, stalking, or threatening an intimate partner or the intimate partner's child,

OR

### *Ordered to refrain from:*

- engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the petitioner or the child,

## ✓ ONE FROM COLUMN B

- *Finding of credible threat:*  
to physical safety of petitioner or their child

OR

- *Express prohibition on conduct:*  
order must prohibit use, attempted use or threatened use of physical force against the petitioner or their child that would reasonably be expected to cause bodily injury.

## STATE OF MAINE

DISTRICT COURT

Location \_\_\_\_\_

Docket No. \_\_\_\_\_

Plaintiff: \_\_\_\_\_

☒ individually and on behalf of: \_\_\_\_\_☐ on behalf of: \_\_\_\_\_

v. \_\_\_\_\_

Defendant: \_\_\_\_\_

☐ on behalf of: \_\_\_\_\_Amended  
ORDER FOR PROTECTION  
FROM ABUSE

(19-A M.R.S.A. §§ 4007)

After due notice and ☐ opportunity for full hearing ☒ full hearing on the merits of the Complaint for Protection from Abuse, the following parties being present: ☐ Plaintiff ☒ Defendant,

Defendant's motion to modify

## THE COURT FINDS THAT: (only checked boxes apply)

- ☒ (1) The parties are family or household members;  
☐ (2) The plaintiff was abused by the defendant;  
☐ (3) The defendant presents a credible threat to the physical safety of the plaintiff/minor child(ren);  
☒ (4) The parties have agreed to the following Order, which is made without findings of abuse.

## THEREFORE, it is hereby ORDERED that:

- ☐ (A-1) The defendant is prohibited from threatening, assaulting, molesting, attacking, harassing or otherwise

- ☐ (H) The parties' personal property and household goods are divided as follows: Defendant shall not threaten or Harass Plaintiff + shall not possess any firearm and the following order for protection of property is entered: while in Cumberland County He may possess a firearm for hunting purposes only outside Cumberland County

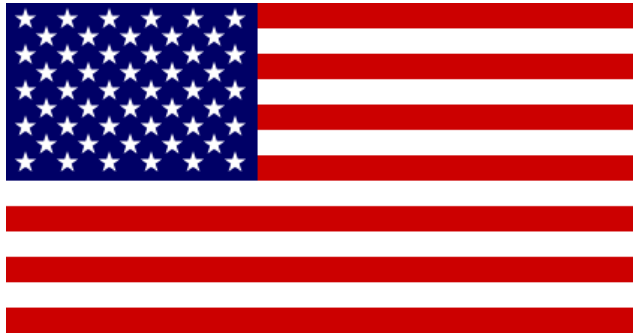
- ☐ (H) The parties' personal property and household goods are divided as follows: Defendant shall not threaten or Harass Plaintiff + shall not possess any firearm and the following order for protection of property is entered: while in Cumberland County He may possess a firearm for hunting purposes only outside Cumberland County
- ☐ (I) The plaintiff is awarded temporary parental rights and responsibilities (custody) of minor child(ren), whose names and dates of birth are as follows: \_\_\_\_\_  
 parental rights + contact shall be governed by \_\_\_\_\_  
 The defendant's rights of contact are limited as follows: \_\_\_\_\_  
 the order in the parties' divorce case

VIOLATION OF AN ORDER CONTAINED IN PARAGRAPHS (A) THROUGH (I) IS ALWAYS A CLASS D, AND SOMETIMES A CLASS C CRIME. POSSESSION OF A FIREARM OR AMMUNITION WHILE THIS ORDER IS IN EFFECT IS PROHIBITED UNDER FEDERAL AND/OR STATE LAW IF ANY ONE OR MORE OF THE FOLLOWING BOXES HAVE BEEN CHECKED: A-1, A-2, OR F.

# RESTRAINING ORDERS IN CRIMINAL CASES AND 922(g)(8)

- Restraining orders issued in criminal cases can trigger 922(g)(8)
- Provided all requirements of that section are satisfied
- Regardless of whether they include a specific gun prohibition

# FEDERAL VS. TRIBAL LAW



- Federal authorities determine, by reference to the requirements of the federal firearm statutes, whether a protection order or misdemeanor conviction disqualifies a person from possessing a firearm under the federal law.



- Tribal court judges DO NOT make that determination, but DO make findings and enter orders crucial to triggering federal law.

# NCIC

- National Crime Information Center:  
<http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm>
- Computerized index of criminal justice information (i.e.- criminal record history information, fugitives, stolen properties, missing persons)
- Operational 24 hours a day, 365 days a year.



# NCIC AND PROTECTION ORDERS

- Purpose – provides notice to criminal justice agencies nationwide of the existence of a qualifying protection order
- Supports the identification of persons prohibited by state and federal laws from purchasing a firearm
- Maintains history of cleared and expired protection orders for five (5) years.

# NCIC AND TRIBAL COURTS

- Section 905(a) of the Violence Against Women Act of 2005 authorizes Tribes to access and input information into NCIC in cases of domestic violence, dating violence, sexual assault, and stalking.
- Despite this, most Tribes lack access to NCIC.
- Needed: T-1 data lines; training; certifying Tribal law enforcement agencies

# EXAMPLES OF DATA ELEMENTS:

Originating Agency Identifier	Subject' s Name	Subject' s Sex	Subject' s Race
One Numeric Identifier	Originating Agency Case # or Protection Order #	Date of Issue	Date of Expiration
Court Identifier	Brady Record Indicator	Misc. Information	Protection Order Conditions

# COORDINATED PRACTICES

## ○ Service

- Documentation of service attempts
- Record of successful service
  - Victim notice/alert, if indicated
- Identification of missing numeric identifiers

## COORDINATED PRACTICES CONTINUED

### ○ **Designate entering agency**

- Promptly enters data from original orders
- Update orders if modified

### ○ **Protective Order Forms**

- Standardized statewide forms
- Passport Page
- Firearm prohibitions specified on form(s)
- Court stamp *re* firearm prohibitions

# THE BRADY ACT HANDGUN VIOLENCE PREVENTION ACT

- Requires all federally licensed gun dealers to do a criminal background check of all purchasers before completing a sale to determine if purchase is disqualified because of –
  - a qualifying protection order or
  - qualifying misdemeanor conviction for domestic violence.
- By statute, the FBI search is limited to three business days; if no state or federal prohibitions are uncovered within that period, the sale is allowed to proceed by default.

# NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS)



U.S. Attorney General established NICS so that any federal firearms licensee (FFL) may contact by telephone, or by other electronic means, for information to be supplied immediately, on whether the transfer or return of a firearm would violate federal or tribal gun prohibitions.

# THE ROLE OF LAW ENFORCEMENT: SEIZING FIREARMS FOR FEDERAL PROSECUTION

Generally, state law enforcement officers cannot seize weapons based upon solely federal violations (unless specifically authorized by state law; U.S. v. Haskin, 228 F.3d 151 (2d Cir. 2000)), or unless the officers are cross-deputized.

If seized firearms are believed to have been possessed in violation of federal law, officers should contact the U.S. Attorney's office or ATF (there is a 30-day period from seizure in which to submit application to the feds).



## *QUICK CHECK: WHEN CAN FIREARMS BE SEIZED?*

Whether firearms should be seized and returned is governed by several federal and tribal laws.

- *What laws do you have in your jurisdiction to seize firearms?*



# WHEN CAN FIREARMS BE RETURNED?

Generally, the guns should not be returned if the person is prohibited from possessing them under any applicable federal, state, or tribal laws, or if the firearms themselves are “illegal.”

Ideally, a firearm return procedure has been established, ***including a court hearing*** to determine the person's eligibility to possess the firearms.

## *QUICK CHECK: LAW ENFORCEMENT PROTOCOLS*

- What role does your local law enforcement have in enforcing firearms prohibitions that are issued in local protection order?*
- If the court says abuser cannot have firearms, can law enforcement search abuser 's residence for firearms?*
- How can law enforcement ensure that the victim will be safe when law enforcement conducts a firearms search or seizure?*
- Does your jurisdiction have an “official use exemption” policy?*

# TAKING FIREARMS AWAY IN POs: CONCERNS IN TRIBAL COMMUNITIES

- Treaty rights
- Subsistence hunting
- Self and community protection – historical context
- Ceremonial uses
- No tribal official use exemption unless cross-deputized and acting in that capacity

# ENFORCEMENT AND ISSUING POs

# EVERY JURISDICTION *BOTH* ENFORCING AND ISSUING JURISDICTION!

## ISSUING

- Issue orders that will be carried to other jurisdictions & require enforcement there
- Should issue clear orders to facilitate enforcement & protect residents when they go to other jurisdictions

## ENFORCING

- (Law Enforcement & Courts)
- Court determines whether order violated under law of issuing jurisdiction
- Court uses enforcing state process & punishment for violations

# WHICH JURISDICTION'S LAWS APPLY?

The **ISSUING** Jurisdiction Determines:

- ✓ whom the order protects
- ✓ terms and conditions of the order
- ✓ duration

# WHICH JURISDICTION'S LAWS APPLY?

## The **ENFORCING** Jurisdiction Determines:

- ✓ how order is enforced (e.g. whether it is contempt of court or crime)
- ✓ the arrest authority of responding law enforcement
- ✓ detention & notification procedures
- ✓ penalties & sanctions for violations



# THANK YOU FOR JOINING THE WEBINAR!

Please email follow up questions regarding protection orders to [nanderson@ncai.org](mailto:nanderson@ncai.org) as we begin planning the second part of this series.