



Governor's Advisory Council on Domestic Violence Training

Kansas Domestic Violence Designation Law (House Bill 2517)

Question and Answer Reference Guide

Arrest

- 1. Question: Can the Standard Offense Report (KSOR) include a place for law enforcement officers to designate the crime as domestic violence related?**

Answer: The Kansas Standard Offense Report and the Kansas Standard Arrest Report currently include a place for the designation of the incident as domestic violence.

- 2. Question: Does this legislation create more issues for law enforcement officers to sort through when making an arrest decision?**

Answer: The investigation and evaluation required by HB 2517 as part of a LEO's arrest decision will require the LEO to apply existing self defense laws in Kansas i.e., defense of self, defense of others, defense of property etc. (*see K.S.A. 21-5222 et seq.*).

LEO's should also be aware of the addition of persons in a "dating relationship" to the domestic violence definitions which formerly included only persons that were "family or household members".

- 3. Question: Are same-sex partners included in the definition of "dating violence" per this law?**

Answer: The definition of "dating relationship" is silent on this question.

1. Question: How will the designation under HB 2517 impact juvenile cases?

Answer: The intent of the drafters was to not include juveniles in the new legislation.

2. Question: Why are domestic violence offenders allowed two diversions in a five year period, whereas a driving under the influence offender would be limited to one in his/her lifetime?

Answer: Legislators viewed diversion in the domestic violence context differently than DUI. However, HB 2517 does elongate the time period between diversions for domestic violence offenders. Previously, diversion was allowed only two times in a three year period. Under the new law, diversion is allowable only two times in a five year period. (K.S.A. 22-2909)

3. Question: What is the standard of proof for the DV designation? Are there *Apprendi* issues?

Answer: The statutes are silent as to what the standard of proof is for applying the DV designation to an offense. The appellate courts have not yet ruled whether *Apprendi* applies to the evidence the State would use to get a DV designation. Prosecutors may want to adhere to *Apprendi* in order to protect the sentence from appellate reversal. This document is written as though *Apprendi* does apply. (See *Prosecution question 4*)

4. How will the DV designation be raised in court?

Answer: The DV designation occurs by the presentation of evidence to the trier of fact. Thus, it will be the prosecutor who presents evidence of a qualifying relationship amongst other evidence for the elements of the crime charged. It is recommended the prosecutor provide early notice (e.g. in the charging document or separate Notice of State's Intent to Seek Domestic Violence Designation) to the defense regarding added elements needed for a DV designation; i.e., the relationship between defendant and the victim, and prove those additional elements in accordance with the beyond a reasonable doubt standard. (See *Prosecution question 3*)

5. Question: Do prosecutors have the discretion to present the information to the trier of fact that this offense is eligible for the designation?

Answer: Prosecutors' discretion is absolute, but if they do intend to seek the domestic violence designation they need to provide notice and prove additional elements beyond a reasonable doubt to avoid possible *Apprendi* issues. (See Prosecution questions 3 & 4)

6. Question: Is the crime of Domestic Battery, K.S.A. 21-5414, presumed to be DV designated?

Answer: No, the prosecutor must still move the court to place the DV designation. In order for the DV designation to occur the prosecutor must prove 1) the elements of the underlying crime and 2) that a qualifying relationship exists. In a prosecution of Domestic Battery under K.S.A. 21-3412a, the statute already requires the State to prove everything that would be needed to apply a domestic violence designation under HB 2517; i.e., that simple battery occurred AND that a qualifying relationship exists.

7. Question: Would the State lose the entire case because they are not able to prove the elements of the "tag"?

Answer: The State would not lose a conviction for an offense because the defense presented evidence sufficient to cause the trial court to decline to place a domestic violence designation on a conviction. The offense of conviction would remain, though it would not be DV designated. (See Prosecution question 8)

8. Question: Will prosecutors need to present evidence of "coercion, control, intimidation" etc. in order to get a DV designation?

Answer: No, the prosecution does not bear the burden of presenting evidence of coercion, control, intimidation etc. in order to get a DV designation.

The statute (K.S.A. 22-4616(a)(2)) states that after the prosecution requests an offense be DV designated, the defense may present evidence to the court for the purpose of preventing a DV designation by the Court. The defense may present evidence that the offense was not used to establish coercion, control, fear, intimidation, or retaliation over defendant's partner. In order to preserve the DV designation, the prosecutor must be ready to direct the Court's attention to

the evidence and testimony presented at trial that demonstrate defendant did intend to establish control, coercion, etc.

9. Question: Does HB 2517 apply only to crimes committed on or after July 1, 2011; or does it apply also to offenses committed before July 1, 2011?

Answer: It is unclear from the way the legislation is written. Normally, a new statute will say, "For crimes committed on or after July 1, 2011 . . ." What this law says is "On and after July 1, 2011, in all criminal cases, if there is evidence . . ." (K.S.A. 22-4616(a)) The safest way to proceed is to not seek a DV designation for any offense that occurred prior to July 1, 2011. To do otherwise risks claims by defense that the DV designation is an ex post facto law.

1. Question: Can the court opt out of applying the designation?

Answer: Yes, only if specific statutory conditions are met. The language in K.S.A. 22-2616(a)(1) states "...if the trier of fact determines that the defendant committed a domestic violence offense, the court **shall** place a domestic violence designation on the case..." However, K.S.A. 22-2616(a)(2) states the court shall not place a domestic violence designation on the criminal case if the court finds that the provisions of 22-2616(a)(2)(A) **AND** (B) are true. In other words the defendant is allowed to present evidence to the court in order to prevent the application of the domestic violence designation, or the court could determine on its own motion not to DV designate the offense after review of the evidence. (*See Prosecution question 8*)

2. Question: Can the DV Designation be removed in the case where a victim of domestic violence is convicted of a crime and wrongly designated?

Answer: The sentencing court retains jurisdiction to modify a defendant's sentence through probation proceedings (K.S.A. 21-6607), or at any time to correct an illegal sentence via K.S.A. 22-3504, where the sentence does not conform to the statutory provision (e.g. where there was no evidence before the court that the DV designated offense was committed for the purpose of coercion, control, intimidation etc.) the court may remove the DV designation pursuant to K.S.A. 22-4616(a)(2)(B). (*See Court question 1*)

3. Question: K.S.A. 22-4616(a)(2)(A) speaks of the defendant not previously having "committed" a domestic violence offense. Does that mean "committed" or "been convicted of"?

Answer: The answer to this question depends on how the term is interpreted by the court. Though the statute is silent, we presume the standard is "preponderance of the evidence" for the court to find on the record that the defendant has satisfied both prongs, (A) and (B) of K.S.A. 22-4616(a)(2). Thus, the court is not only bound to find that there was no previous domestic violence occurrence or charge (which might be difficult for the prosecutor to disprove), **AND** that in the commission of the current offense the defendant did not intend to use such offense to intimidate, coerce, control, punish or seek revenge on the defendant's partner (a more difficult issue for the defense to prove and much easier for the prosecution to refute).

- 4. Question: Regarding the court not placing the designation as stated in K.S.A. 22-4616(a)(2), this subsection requires a finding “on the record.” What about courts that have no record?**

Answer: As long as the designation, or lack of a designation, is articulated on the journal entry, it is on the record. The best practice would be to draft the journal entry to clearly articulate that the court did not place a domestic violence designation based on the findings.

- 5. Questions: Are special jury instructions necessary?**

Answer: Special instructions are not necessary for the jury. The jury will already be provided a PIK instruction for the offense charged. For the designation to be applied, and a guilty verdict to be handed down, the trier of fact must be able to find beyond a reasonable doubt that 1) an offense occurred and the elements of this offense have been proven; and 2) a qualifying relationship exists between defendant and victim. By satisfying these two prongs, the prosecutor has proven the case and provided the evidence necessary for the designation to be applied.

- 6. Question: How do we indicate the designation in a case? There is no box on the felony journal entry.**

Answer: The Kansas Sentencing Commission agreed to amend the standard felony journal entry to include a place for a Domestic Violence Designation for each offense of conviction. Additionally, the Kansas Adult Disposition Report (KADR) was amended by the KBI to include a column for domestic violence and a designation box is included in the program section for Domestic Violence Assessment to reflect if/when the assessment is ordered. The amended felony journal entry of conviction and KADR will be disseminated prior to July 1, 2011 (<http://www.accesskansas.org/ksc/forms.shtml>).

- 7. Question: How do municipal courts provide the DV designation information to the KBI? Do they need to change the disposition report?**

Answer: See Court question 6 above regarding the amendment of the KADR. In addition, the KBI is currently training municipal and district courts to submit all reports for any level of offense, including Class C misdemeanors. Specifically, prosecutors and clerks in municipal or district courts are encouraged to submit the reports for disorderly conduct due to tracking

purposes related to the Kansas concealed carry law (K.S.A. 75-7c01 et seq.). The statute requires the submission of all A & B misdemeanors and all C level assaults.

8. Question: Does the “designation” stay with the case as a case number, or with each individual charge if there are multiple charges in the case?

Answer: The language of the statute (K.S.A. 22-4616) states “case” but the intent of the drafters was for the designation to remain with the individual charge. Additionally, based on the court data system, each charge will have to be entered separately, making it essential that each charge be independently designated. If the underlying offense was committed in the context of domestic violence, then the charge resulting from that offense should be designated. However, there could be a case where there are several underlying charges and not all qualify for the designation.

For instance, an offender is charged with battery of his/her intimate partner and after the battery the offender fled. Shortly thereafter offender is stopped in his/her car by law enforcement officers, at which time the offender is found to be driving under the influence and in possession of marijuana. The domestic violence designation would apply only to the domestic violence offense rather than all three of the offenses that could be charged.

9. Question: If we already have “DV” in the case number, will the court have to make a different and additional “domestic violence designation” on the case assuming the trier of fact makes the required finding?

Answer: Yes. The domestic violence designation is a separate designation on the journal entry of conviction and the KADR resulting from presentation of evidence of a criminal offense and a relationship between the defendant and victim all proven beyond a reasonable doubt to the trier of fact. The case number would not need to change (courts have the authority to label their cases as they wish; e.g., CR, DM, DV, etc.; see K.S.A. 22-4617). (See Prosecution question 3)

10. Question: If we already have DV in the case number, and the trier of fact fails to make the required finding, do we have to change our case number?

Answer: No; see Court question 9.

11. Question: As for the trier of fact making the determination whether the defendant committed a domestic violence offense, in cases of a jury trial, will this be done by special question?

Answer: If there is an offense committed within a qualifying relationship then there is no need for a special determination because it is answered by the elements and the statutory definitions of “domestic violence” and “domestic violence offense” at K.S.A. 21-5111 (*see 2011 Session Laws, chapter 30 §6 until 2011 K.S.A. Supplements are published*). The State need only prove the elements of the offense charged and that there is a qualifying relationship between the defendant and the victim; the offense will then by statutory definition be a domestic violence offense.

12. Question: What will be the burden of proof?

Answer: The prosecutor should provide notice to the defense of the State’s intent to seek the DV designation and prove the additional element (i.e., the relationship between defendant and victim) beyond a reasonable doubt to avoid any potential *Apprendi* issues. Though the statute is silent, we presume the burden of proof for all issues related to removal of the designation by the defense per K.S.A. 22-4616(a)(2) is preponderance of the evidence. (*See Prosecution question 3*)

13. Question: In cases of a jury trial, will the trier of fact’s determination have to be unanimous?

Answer: Yes, unanimity as to the elements of the offense and also as to the relationship between defendant and victim. (*See Prosecution question 3*)

14. Question: Does HB 2517 apply to municipal Courts?

Answer: Yes, HB 2517 applies to all criminal cases; see K.S.A. 22-4616(a).

15. How should the DV Designation be handled in a plea setting?

Answer: A case wherein the prosecution notifies the Court and defense the prosecution will seek a DV designation can be handled as other cases in the event of a plea agreement. The State and defense will agree that defendant will plead to the underlying offense and that the charge will be DV designated. The prosecution should include as part of the recitation of facts to the Court the existence of the qualifying relationship between the defendant and the victim. Though the defense is permitted by statute (K.S.A. 22-4616(a)(2)) to present evidence to the Court to prevent the DV designation, in the case of a plea the defense will agree to a proffer or stand silent, thus allowing the Court to find that a domestic violence offense has been committed and so designate the charge; see K.S.A. 22-4616(a)(1).

Supervision

- 1. Question: What is the consequence for the defendant if an assessment ordered pursuant to K.S.A. 21-6604 (see 2011 Session Laws, chapter 100 §18 until 2011 K.S.A. Supplements are printed) is not completed? How is this reported?**

Answer: In a DV designated case the assessment is mandatory and is imposed by the court as part of the sentence. Failure to obtain the assessment or follow the recommendations thereof will be a violation of defendant's terms of probation and could lead to the revocation of defendant's probation if the violation persists.

Where a defendant is not supervised by a probation or parole officer, each community and court will need to identify a system that will work locally to ensure that offenders are completing the assessment and following the recommendations.

It is recommended that after sentencing, the court send the assessment provider a letter alerting them that a referral was made and the offender needs to complete the assessment by a specific date. The provider would then alert the court and prosecution if the offender does not meet this objective. The prosecutor would file a revocation of probation based on the offender's non-compliance.

- 2. Question: Will domestic violence designated offenders be placed on supervision? If not, how does bench supervision work?**

Answer: Each jurisdiction will have to experiment to find the best local solution. Bench supervision could be facilitated through the use of a standard referral form for offenders in meeting the conditions of the court. In furtherance of this idea, the offender would select a Batterer Intervention Program (BIP) from the list (see list of approved BIP's at www.ksag.org/files/Certified_BIP_programs.pdf) and notify the court. The court would send the standard form to the BIP notifying them of the referral and that the offender has 30 days to complete the assessment, requesting that if the assessment is not completed within that time frame to please alert the court. Additionally, the judge or prosecution could hold review hearings. (See Supervision question 1)

3. Question: How do supervision officers know the assessment is completed and what the recommendations are?

Answer: Courts and/or supervision officers who made the referral will be sent the assessment form and a list of recommendations after the assessment is completed.

4. Question: What information does a supervision officer or court need from the assessor?

Answer: The assessor is able to provide a recommendation on appropriateness for Batterer Intervention Program. The assessor will also be able to provide the supervision officer with an idea about an offender's potential risk of reoffending and lethality.

5. Question: What should Batter Intervention Provider's and supervision officers do with the information provided by victims outside the context of the initial assessment?

Answer: For supervision officers, this depends on the policy of the organization.

BIP's approved by the Kansas Attorney General's Office must adhere to the *Essential Elements and Standards of Batterer Intervention Programs* (found at www.ksag.org/files/BIP_Standards_Revised_12_14_09.pdf) which states "Information shared by the victim shall only be used with the victim's documented consent and only after a discussion of the victim's safety..."

Batterer Intervention Providers (BIP) & Assessors

1. Question: What is an approved Batterer Intervention Program (BIP)?

Answer: An approved BIP is one that meets the *Essential Elements and Standards of Batterer Intervention Programs in Kansas* (found at www.ksag.org/files/BIP_Standards_Revised_12_14_09.pdf), and, after an application process, can be recognized by the Attorney General's office as being approved to provide the Kansas Domestic Violence Offender Assessment and subsequent intervention services for batterers. Information on these programs can be found at: www.ksag.org/page/batterer-intervention-programs or by contacting the Attorney General's BIP coordinator at 785-296-3367.

2. Question: What is a mandatory assessment?

Answer: See Section titled "Mandatory Assessment" (below).

3. Question: Will BIP's need any information from the courts to complete the mandatory assessment?

Answer: The assessment was not designed to be done in isolation, and the more information available to the assessor, the more accurate the resulting assessment will be. For more information regarding sources of information see the *Essential Elements and Standards of Batterer Intervention Programs* (found at www.ksag.org/files/BIP_Standards_Revised_12_14_09.pdf

and,

www.ksag.org/page/batterer-intervention-programs)

It should be noted that Court Supervision Officers are prohibited by law from revealing a defendant's criminal history derived from the National Crime Information Center (NCIC).

4. Question: What information can Batter Intervention Providers get from a victim advocate?

Answer: This is up to the victim. If the victim provides informed and written consent following a full conversation of the risks and benefits associated with the release of information to the BIP, then the advocate may release the specific information requested by the victim.

BIP programs are required to have a relationship with their local domestic violence agency in order to be approved. Accordingly, the focus of information sharing in this relationship is for the BIP to share necessary information with the advocate and not the victim advocates sharing information with the BIP (unless requested by the victim and necessary releases are signed).

Mandatory Assessment

1. Question: What is a domestic violence assessment and what is the purpose of the assessment?

Answer: Persons convicted of a DV designated offense shall be referred by the courts for an assessment, or by the prosecutor in the case of a diversion. The purpose of the assessment is two-fold: 1) to determine the appropriateness for intervention by a batterer intervention program (BIP) and, 2) to gather enough context and background to determine the level and focus of the intervention. The assessment should not be used as a supplement to the standard Pre-sentence Investigation (PSI).

Currently there is no particular assessment singled out by K.S.A. 21-6604 (*see 2011 Session Laws, chapter 100 §18 until 2011 K.S.A. Supplements are printed*). The statute simply directs "...the court shall require the defendant to undergo a domestic violence offender assessment and follow all recommendations...". In the absence of Rules and Regulations directing the Court's and BIP's to use a particular assessment, any assessment conducted by anybody is allowed.

BIP's approved by the Attorney General's Office will use the Assessment Tool also certified by the Attorney General's Office. For more information on the Assessment Tool and certified BIP's see www.ksag.org/page/batterer-intervention-programs. (*See Supervision question 1*)

2. Question: What if there is no approved BIP in the area to refer offender to?

Answer: We recommend courts always use approved BIP's when available. If no approved BIP provider is available in your area you may consider encouraging local programs to apply for approval by the Attorney General's Office. For more information on becoming an approved BIP see www.ksag.org/page/batterer-intervention-programs.

At this time courts may legally refer persons convicted of a DV designated offense to any BIP provider.

3. Question: How defensible is the Assessment Tool?

Answer: The Assessment Tool is empirically based, which means it is based on research, but much of the Assessment Tool contains social history, behavior patterns, etc., and this type of information in an assessment cannot be validated. However, the Assessment Tool is created from an assortment of validated tools and includes a validated instrument, the DVSI-R. Additionally, best practice guidelines were used in the compilation and development of the tool.

4. Question: How long does the Assessment Tool take to complete?

Answer: Approximately 1 – 1 ½ hours is spent on the offender interview portion of the assessment. Additionally, the assessor gathers other information, attempts to make contact with the victim, and reviews reports among other tasks resulting in an overall time of approximately 3 ½ to 4 hours for the full assessment.

5. Question: What if the Assessment Tool is completed in part and sections are missing information? What if there is no evidence to support the information?

Answer: The Assessment Tool is created to survive as a useful tool for evaluating the needs of an offender even in the absence of information requested by the assessment, e.g. offender provides inaccurate social history, victim cannot be contacted, absence of police reports etc. Further, the Assessment Tool is required to be completed by an experienced and trained assessor who is able to compensate for the absence of, or inaccuracy of information.

6. Question: Who developed the Assessment Tool?

Answer: A multidisciplinary team created the Assessment Tool.

7. Question: How much does an assessment cost?

Answer: Each assessment provider determines and sets the cost of the assessment. Generally, the cost is between \$75 and \$150 per assessment.

8. Question: How will the assessment be paid for?

Answer: In most cases the offender is responsible for paying for the assessment. Note: A recent survey showed that nearly 70% of those seeking assessments could pay for them. Additionally, if the offender is determined indigent by Kansas Department of Corrections (KDOC) standards and is in their custody, KDOC may pay for the assessment, but the offender may have to pay back the cost of the assessment to KDOC. Accordingly, it is best practice for assessment providers to work with indigent offenders to pay for the assessment.

9. Question: When should the assessment be performed?

Answer: The assessment should be performed after sentencing. Though the statute allows the court to order an assessment prior to sentencing, this practice should be discouraged. A defendant is not likely to admit anything during a presentence assessment (and will likely be instructed by defense counsel to not admit) or will possibly try to give false answers to the assessor in the hopes of lessening the possible consequences of the criminal act. There also is the possibility that a presentence assessment could cause the victim to be in danger as the defendant may seek out and pressure the victim to provide false information to the assessor for the victim contact portion of the assessment.

10. Question: What percentage of those assessed are assessed as appropriate for BIP services?

Answer: Generally, around 80% of those assessed are appropriate for BIP services, while 20% of those assessed are deemed not appropriate for BIP services.

11. Question: What if the BIP orders the offender to do things beyond the power of the BIP?

Answer: K.S.A. 21-6604 (*see 2011 Session Laws, chapter 100 §18 until 2011 K.S.A. Supplements are printed*) allows the courts or parole officers to remove recommendations by the BIP believed to be inappropriate.

This document was developed by the Kansas Governor’s Advisory Council on Domestic Violence Training in an effort to strengthen criminal justice professionals’ understanding of the Kansas Domestic Violence Designation Law. The opinions expressed herein are non-binding and are non-judicial in nature. They are intended only as an educational tool for the criminal justice community. Formal enforcement and interpretation of the law remains the responsibility of law enforcement, state prosecutors, and the judicial branch. Nothing herein should be construed or interpreted to interfere with, override, or remove that responsibility. This project is supported by Award No. 2006WEAX0003 awarded by the Office of Violence Against Women, U.S. Department of Justice to the Office of the Governor. The opinions, findings, conclusions, and recommendations expressed in this publication/program are those of the authors/presenters and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

¹ *International Association of Chiefs of Police*, Concepts & Issues Paper to accompany Domestic Violence Model Policy for Law Enforcement (2004).

² *Grants to Encourage Arrest Program*, Project Narrative (2006).