Chapter 7: P.F.M.A Basics

I. WHAT IS PARTNER OR FAMILY MEMBER ASSAULT?

The offense of domestic violence in Montana is codified in Section 45-5-206, M.C.A. and is referred to as Partner or Family Member Assault.

A. Elements of Partner/Family Member Assault:

1. Are they Partner or Family Members as defined by 2(a) and 2(b).
2. Client's Intent?
3. Client's Act or Actions?
   a. Did clients act or actions cause reasonable apprehension of bodily injury?
   b. Did client's acts or actions cause bodily injury as defined by Section 45-2-101(5), M.C.A.?
   c. Did client negligently cause bodily injury with a weapon?
4. Alleged Victim's Apprehension Reasonable?
   a. Objective Standard - ex) being "scared" is not enough
   b. Did alleged victim sustain bodily injury?
      i. For example: what if pushing does not cause bodily injury?

Note: Don't be too rigid in applying the facts to the elements. Often times, criminal defense attorneys will look to see if all of the elements of the crime are satisfied as a determination as to whether their client is legally guilty. But jurors don't think like lawyers. Domestic violence is what a jury says it is! Often times a domestic violence case is not black and white. In these cases, an effective argument may be that although your client's actions were not perfect—i.e., his actions don't rise to the level of p.f.m.a. or that it was a mutual argument. Jurors, especially married jurors, will understand this argument. You must be careful, however, when making this defense as the jurors may think you are admitting guilt or at least some level of culpability.

II. OTHER ISSUES RELATING TO THE CHARGE OF P.F.M.A.:

A. Penalties:

Note: Be thorough and accurate in investigating your client's history to determine the presence of possible prior PFMA charges/convictions.

1. P.F.M.A. has an escalating scale of sanctions.

2. A 1st time P.F.M.A. offender faces a mandatory jail term of 24 hours, a maximum jail term of one year, and a fine of between $100 and $1000.
3. A 2nd time P.F.M.A. offender faces a mandatory jail term of 72 hours, a maximum jail term of one year, and a fine of between $300 and $1000.
4. A 3rd time P.F.M.A. offender – now guilty of a felony – faces a mandatory jail term of 30 days, a maximum jail term of five years, and a fine of between $500 and $50,000.
5. Court-ordered counseling is a requirement for all offenders.

B. Predominant aggressor situations:

1. When a peace officer responds to a partner or family member assault complaint and if it appears that the parties were involved in mutual aggression, the officer is required to evaluate the situation to determine who is the predominant aggressor**.**
2. If, based on the officer's evaluation, the officer determines that one person is the predominant aggressor, the officer may arrest only the predominant aggressor.
3. A determination of who the predominant aggressor is must be based on but is not limited to the following considerations, regardless of who was the first aggressor:

   i. the prior history of violence between the partners or family members, if information about the prior history is available to the officer;

   ii. the relative severity of injuries received by each person;

   iii. whether an act of or threat of violence was taken in self-defense;

   iv. the relative sizes and apparent strength of each person;

   v. the apparent fear or lack of fear between the partners or family members; and

   vi. statements made by witnesses.

<u>Note:</u> This statute can provide an effective line of cross-examination for two reasons: 1) to argue that the officer made mistakes in determining who the predominant aggressor was, and 2) to explain why an arrest was made when perhaps one should not have been. However, be

careful when cross-examining the officer as you may open the door to why he arrested your client, including your client's "prior history of violence."

C. Justifiable Use of Force (See: M.C.A. 45-3-102 & M.C.A. 46-16-131)

D. Defense of Property (See: M.C.A. 45-3-103 & - 104)

E. Use of Force by Aggressor (See: M.C.A. 45-3-105)

F. Use of Force by Parent, Guardian, Teacher (See: M.C.A. 45-3-107)

III. PLEADING TO AN AMENDED CHARGE:

A. Assault (See M.C.A. 45-5-201 and *State v. Aune*, 2006 MT 113, 332 Mont. 211, 136 P.3d 529: assault is not a lesser included offense of partner or family member assault when reasonable apprehension is charged.)

B. Disorderly Conduct (See M.C.A. 45-8-101.)

Note: If the prosecutor is unwilling to amend the charge you should consider submitting jury instructions and verdict forms anyway and argue that assault / disorderly are lesser included offenses.

IV. DEVELOPING YOUR DEFENSE. (To develop a strong defense there must be 1) a complete factual investigation, and 2) thorough legal research.)

A. Factual investigation.

Note: Facts are stubborn things. It is better to know the bad facts than to be surprised at trial. Therefore, a complete factual investigation is important to a successful defense or resolution. A complete factual investigation often begins with the initial consultation with your client. During this consultation--ask your client for his side of the story. Ask him for the name, addresses, and phone numbers of any witnesses, possible defenses, etc. These kind of questions make your client feel that you are on his side. Toward the end of the consultation is when you should discuss the weaknesses in his case , your concerns, and the possible penalties. Beginning a consultation with weaknesses in your client's case and possible penalties is a sure way to guarantee a communication breakdown between you and your client.

B. Legal Research: There is no substitution for understanding and researching the relevant law.

C. After a complete factual investigation and thorough legal research is conducted ask yourself this one question:

MY CLIENT IS INNOCENT BECAUSE _____.

Note: if you are unable to fill-in the above blank then you may wish to consider discussing plea negotiations with your client. (Keep in mind, too, that you must communicate all proposed plea offers to your client.)

V. JURY SELECTION

A. The purpose of jury selection is three-fold:

1. to educate the potential jurors about the law and the legal process,
2. to address concerns, i.e. negative facts in your case,
3. to eliminate adverse jurors.

Note: Effective voir dire usually begins with review of the jury questionnaires. Jury questionnaires offer initial insight into the entire venire. The questionnaires often provide information such as, age, residence, education, employment, marital status, children, prior jury service, etc. This information provides a foundation for effective voir dire.

It is also important to observe non-verbal cues during the prosecution's voir dire. Non-verbal cues can assist you during the voir dire process. You must ask yourself questions and make the appropriate notations. What is the potential juror's physical appearance? How are they dressed? What are they reading? In addition, observe their body language, facial expressions, jewelry, hygiene, etc. Look for those in the venire who avoid answering questions, those that equivocate or answer in vague terms, those that are hesitant in responding to your questions, those that act differently when asked questions by the prosecutor.

B. In addition to the basic questions, here is a list of P.F.M.A. specific questions to consider asking jurors during voir dire:

Re: Violence in General

1. Have you ever been involved in a physical altercation as a participant, victim, or witness?
2. Have you or has anyone close to you ever been the victim of violence?

3. Have you or has anyone close to you been involved in marital disputes that involved physical violence?
4. Have you, any member of your family, or any close friend been involved in a dispute in which the police have been called?
5. Have you ever notified the police to respond to a neighbor's home because you thought a physical dispute was going on?
6. Have you ever heard what you believe was a physical altercation taking place at a neighbor's home?
7. Have you had occasion to call the police for your own protection from physical violence?
8. Have you had occasion to call the police to protect others from physical violence?
9. Do you have strong feelings about use of violence?
10. Have you ever experienced fear due to apprehension of violence?
11. Is it ever okay to physically assault another person? (Hint: Answer is yes… in self-defense/defense of others ONLY)

Note: The above questions (nos. 1 through 11) are taken from the National District Attorneys Association website, www.ndaa-apri.org.

Re: Presumption of Innocence

1. If someone is arrested, charged with a crime, and brought to trial—would you think that they are guilty of something?
2. Ever heard of the "presumption of innocence?" What does that mean to you?
3. Why should a jury acquit if the prosecution fails to meet its burden and fails to prove its case beyond a reasonable doubt? (Ask each prospective juror this individually and incorporate the theme into your closing argument.)

Re: Proving This Kind of Offense

1. How many of you heard of the legal word "hearsay?" What is hearsay? Why isn't hearsay admissible in court? How would you feel is someone made allegations against you but failed to show up for court to testify?
2. Would you be able to follow the jury instructions even if you disagree with them?

Re: Issues of Alcohol

1. What are your views on alcohol?
2. Would it bother you if there was evidence that my client was intoxicated?

Re: Deliberations

1. Have you been a juror before? Was it a criminal or civil case? What was the verdict? Were you the foreperson?
2. What are deliberations? If chosen as a foreperson, how do you insure fair deliberations?
3. Why is it important to deliberate before voting on a verdict? How do you insure all voices are heard?
4. What would you do if you strongly disagreed with another juror on an issue? How would you resolve disagreements with other jurors?

Note: Ask these questions in order to encourage democratic deliberations. Sometimes one or more jurors push their agenda through even though they are the minority voice. You want to create dynamics and debate between all jurors so they discuss the evidence, testimony, contradictions, etc. Hopefully, this leads to more doubt and thus an acquittal. Sometimes jurors may disagree so much that they dig their heels in and won't move from their vote. Thus, leading to a hung jury.

Re: Law Enforcement

1. What should an officer investigating a case of domestic violence do?
2. Why is a thorough investigation important?

Note: These questions should be asked in cases when an officer fails to take photographs, preserve evidence, or fails to interview witnesses. Or, in a case of self-defense (M.C.A. 45-3-110 & - 112.) Jurors tend to have a lot of respect for law enforcement. But if you can establish that law enforcement did not follow proper procedure some of this respect can be chipped away.

Re: Questions for Adverse/Evasive Potential Jurors:

1. If you were my client would you want a juror like you? Why? Why not?
2. Do you believe that defendants have too many rights?
3. Do you believe that domestic violence is a serious issue? Do you believe that domestic violence is an epidemic?

Re: Right Not To Testify

1. Do you understand that under the Constitution, a person accused of a crime has both the right to testify and the right not to testify? Why is this?
2. Could you give me a reason why a totally innocent person would not testify?

Re: Burden of Proof

1. Have you heard the phrase "burden of proof" before? What is it?
2. Who do you believe has the burden of proof in a criminal case?
3. Does my client have to prove his innocence?
4. As defense counsel, what is my job during this trial? What if I failed to call any witnesses or present any evidence on behalf of my client? Would you be more likely to convict? Why?

Re: Withholding judgment till all facts are in

1. Why is it important to withhold judgment until you have heard all the evidence in this case?
2. Why is it important to hear both sides before rendering a verdict?

Know the applicable statutes **and local rules (!!)** regarding the jury selection process in your jurisdiction.

Note: Before approaching voir dire in any case you should make sure to consult Dr. Sunwolf's book Practical Jury Dynamics. The book should be available for your use by contacting your nearest OPD office.

VI. MOTION PRACTICE IN P.F.M.A. CASES

Note: It is often said that a good defense is a good offense. Pre-trial motions and hearings on the Confrontation Clause will invariably assist you in staying on the offense and in getting a better plea agreement. The following list of typical motions filed in P.F.M.A. cases is not exhaustive. Above all else: be creative!!

A. Motion to exclude your client's prior bad acts, crimes, wrongs.

B. Notice of intent to introduce evidence of prior bad acts, crimes, wrongs by the alleged victim.

C. Motion to prevent prosecutor from using the term "victim"

D. Motion in limine dealing with confrontation clause / hearsay issues

Note: Often times it is uncertain that the alleged victim will appear at trial. In such event, you must prepare two cases: one in the event the alleged victim or witnesses appear in court, and another in the event they don't. Even if the alleged victim fails

to appear at trial the prosecution may attempt an "evidence-based prosecution." Often times when witnesses are not available prosecutors will attempt to elicit inadmissible hearsay into evidence as part of their "evidence-based prosecution." Defense counsel is then put in the unenviable position of objecting and fearing the wrath of the jury as it appears defense counsel is hiding something. To alleviate this concern: address the issue in your motions in limine and in your trial brief. The judge will usually state that the motion is premature and that the objection to the hearsay should be made at trial. However, this puts the prosecutor and the judge on notice. In addition, it is important to discuss to the jury during voir dire what hearsay is and why it is inadmissible in court. When the prosecutor attempts to elicit inadmissible hearsay, immediately request a sidebar and make your objection known with the mention of a possible future request for a mistrial. Make sure this is on the record.

For a more comprehensive discussion regarding these issues, refer to the Piocos manual, cited above.

VII. PREPARING THE P.F.M.A. CLIENT

Note: The initial appointment is important. It is usually the first opportunity to obtain your client's side of the story. This will assist in both your investigation and motion practice. The initial appointment usually involves the following: 1) intake form; 2) photograph of client's injuries; 3) client's version of events; 4) names, addresses, and phone numbers of client's witnesses, etc. Additionally, obtain the facts that allow you to humanize your client, such as, employment, marital status, children, residency, hobbies, etc. Remember, if the jury likes your client you are more likely to obtain acquittals on those close cases.
Explain to your client the maximum penalties, compliance with conditions of release, no contact order--including not phoning, emailing, text messaging the alleged victim or witnesses, and not to discuss case with anyone. If your client is incarcerated remind him that his conversations are recorded and that visits from the alleged victim or witnesses are not allowed. In addition, explain to your client about their appearance and demeanor in court and on the stand. It is also advisable to have your client testify last in his case-in-chief. This allows your client to hear almost all the evidence before he takes the stand. Problems arise when your client testifies first and his own witnesses contradict him afterwards. Putting your client on last may avoid this problem. This also allows you the opportunity to rest your case on a high note.

VIII. OPENING STATEMENT IN A P.F.M.A. CASE

Every case is different. That said, here is a suggested structure:

A. Introduce your themes

B. Humanize your client.
C. Give the jury dates and times
D. Describe the parties involved
E. Describe the witnesses who will appear in court
F. Set the scene by telling a story
G. Include actions
H. Address adverse facts
I. Address missing elements of the state's case / your affirmative defenses
J. Emphasize the client's innocence
K. Preview the not guilty verdict

IX. EXHIBITS

Note: It is very important during discovery to make a list of all the exhibits you intend on using at trial. Pursuant to discovery rules, this evidence must be timely disclosed to the prosecution. Typical exhibits in domestic violence cases include: the 9-1-1 Tape, photographs of the scene, photographs of injuries, a copy of restraining order. Trial by ambush is no longer tolerated . It is always wise to disclose potential evidence to the prosecutor and avoid having the judge exclude it later.

A. Photographs.

Note: There are several elements required in admitting photographs through a witness: that the witness is familiar with the image in the photograph, the basis of his or her familiarity; that he or she recognizes the image in the photograph and that it is a fair and accurate depiction of the image during the relevant period.

B. The 911 recording.

Note: Typically in domestic violence cases the prosecution plays the 9-1-1 tape during the direct examination of the alleged victim. However, in some cases the 9-1-1 tape supports your client's case—i.e. used to impeach the testimony of the alleged victim. It is good practice in these cases to play the 9-1-1 tape during the interview of the alleged victim so that it can be later authenticated and a proper foundation laid in court and so the alleged victim can be pinned down.

When the alleged victim does not testify the prosecution as part of it's "evidence-based prosecution" will attempt to introduce the 9-1-1 call through the dispatcher as a business record. Remember: a business record is an exception to hearsay but does not get around the Confrontation Clause!

There are several elements required in admitting a 9-1-1 call through a witness:

(1) that the witness called 9-1-1;
(2) that the witness had the opportunity to hear the 9-1-1 call,
(3) the basis of his or her familiarity;
(4) that the 9-1-1 call is a fair and accurate recording of what she told the 9-1-1 dispatcher.

Move to introduce the 9-1-1 call and then play the recording for the jury.

C. Restraining orders.

Note: Sometimes an alleged victim files a Petition requesting a Restraining Order against your client. It is important to obtain a copy of the Petition (as original is filed with the court).

There are several questions you should ask in admitting a copy of the Petition/Affidavit:

(1) whether the witness can identify and recognize the Petition/Affidavit;
(2) the basis of her familiarity;
(3) whether she signed the Petition/Affidavit under oath;
(4) the date she wrote the Petition/Affidavit;
(5) the date she signed the Petition/Affidavit;
(6) the date she filed it in court;
(7) whether it is a fair and accurate copy of the Petition/Affidavit; and
(8) whether any changes have been made to the Petition/Affidavit.

X. CROSS EXAMINING THE ALLEGED VICTIM

Note: There is no boilerplate for cross-examining an alleged victim. Every case is different. However, there are some effective techniques.

A. Effective cross-examination begins with conducting a comprehensive investigation and interviewing the alleged victim and other witnesses.

B. Get your client involved in the case by having him draft questions. He know the witnesses better than you and knows how they will probably answer. Remember, however, that as the attorney you make all decisions regarding which questions will be asked at trial.

C. The typical "he said/she said" case comes down to credibility. You must give the jury reasons not to believe the prosecution's witness. Understand the alleged

victim's bias, motive, and agenda. Be aware of any inconsistent statements and contradictions with other witnesses and physical evidence. Be ready to confront the witness with these contradictions and inconsistent statements.

D. Listen to the witness's answer. Effective cross-examination involves active listening.

E. If a witness is lying, be prepared to confront the witness about it. If the witness is non-responsive, pin the witness down. If the witness continues to avoid answering the question, request assistance from the judge.

XI. CROSS EXAMINING THE LAW ENFORCEMENT OFFICER IN A P.F.M.A. CASE

Note: Because of hearsay, chain of custody, and other issues prosecutors typically call the officer last in their case-in-chief. However, if they call the officer first, be prepared to make a lot of objections. Let the judge and jury know that the hearsay and chain of custody issues would be alleviated if the prosecutor called the officer last. Remind the judge and jurors, during your objection, that the officer was not there and has no personal knowledge of the events.

Prosecutors, aware of the contradictions in the alleged victim's version of events, will often try to narrow the scope of their direct on other witnesses. To avoid this be sure to list the witness on your witness list and/or reserve the right to call the witness as a rebuttal witness.

A. The Pre-Interview

Note: A pre-interview involves an officer "coaching a witness" before he records the statement. This allows a witness to modify her statement off the record. It also allows the officer to avoid asking questions that don't help the prosecution's case. Ask witnesses and law enforcement if there was a pre-interview. Be aware of the facts that were omitted from the recording.

B. Other lines of questioning include:

1. The officer was not there;
2. He based his decision upon hearsay;
3. He failed to take photographs;
4. He failed to preserve evidence
5. He failed to interview witnesses;
6. Evidence is lacking or not present,
7. He obtained statements from witnesses that contradict other witnesses,

8. The physical evidence is inconsistent with witness' testimony; and
9. The officer failed to follow standard procedure or protocols.

XII. CLOSING ARGUMENTS IN A P.F.M.A. CASE

Note: Begin and end with your strongest point. (This is the doctrine of "recency and primacy.")

A. Address any concerns / weaknesses in your case

B. Address missing elements or affirmative defenses
C. Address weaknesses in the prosecution's case
D. Address the burden of proof and reasonable doubt

Note: The reasonable doubt argument can be effective in some cases. However, if you argue that your client is not guilty because the prosecutor failed to prove its case beyond a reasonable doubt the jury may translate that as: "Your client is guilty. But you want us to find him not guilty because the prosecution's case is not as strong as it should be." Whereas the more effective argument is that your client is "innocent and that the prosecution cannot meet its burden of proof because your client is innocent." You must appear honest and sincere in this argument. If you do not believe that your client is innocent then why should the jury? Remember: jurors tend to acquit for two reasons: 1) out of a sense of fairness 2) fear of convicting an innocent person. By tying these arguments to reasonable doubt you have increased your chance of acquittal.

XIII. SENTENCING

Note: There are six main issues addressed at sentencing in domestic violence cases: 1) Length of Incarceration, 2) Probation 3) Amount of Fine, 4) Completion of Anger Management, 5) Chemical Dependency Evaluation/Treatment, 6) Contact with the Alleged Victim. These issues must be addressed in both the plea agreement and at sentencing. These issues must also be discussed with your client before sentencing. In most jurisdictions, a condition of the sentence must be rationally-related to the offense. If the judge imposes a condition that is not rationally related to the offense you must object in order to preserve the issue on appeal. This may avoid a revocation down the road.

In a contested sentencing hearing it is important to have witnesses who can testify on your client's behalf. In some cases it may even be such that the alleged victim will be willing to do so.

Remember to get clarification regarding visitation rights.

XIV. FEDERAL IMPLICATIONS OF P.F.M.A. CASES

Note: There are three main federal implications of a domestic violence conviction:

A. Ability to own or possess a firearm

B. Immigration issues

CAVEAT: be aware of your client's immigration status. Know the potential impact of a conviction on your client's immigration status and advise your client accordingly. Understand potential resolutions that would avoid your client's deportation or exclusion.

During the initial consultation, ascertain your client's citizenship status. Specifically, ask: is he or she a United States citizen, legal permanent resident, non-immigrant visa-holder, or an illegal alien? Your client's status is important in determining the immigration consequences of a criminal conviction, such as, grounds for deportation under 8 U.S.C. Section 1227, and grounds for exclusion under 8 U.S.C. Section 1182.

Next, determine the offense or offenses upon which your client was charged. Is your client charged with a misdemeanor or a felony? Is your client charged with domestic violence, stalking, child abuse or a violation of a protection order? Is it a crime involving moral turpitude? Was there serious bodily injury? If a felony, was it an aggravated felony? These are just some of the questions that must be answered in advising your client and preparing your case.

The Immigration Nationality Act makes a person deportable if he or she is convicted anytime after entry of a crime of domestic violence in violation of any federal, state or local law. Unlike other crimes involving moral turpitude, a domestic violence conviction triggers removal regardless of the sentence involved and/or when it occurred, a sentence of one year or more and your client may be considered an aggravated felon and trigger expedited removal. These issues should be discussed with your client and addressed in the plea agreement.

C. The impact of the conviction on subsequent sentencing in federal court.

A conviction of domestic violence may have an impact on a federal sentence as well. Therefore, it is important that you review the possibility with your client, if applicable. You should also discuss the case with the attorney who is representing him on any federal charges.