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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 23, 2010

Title	Agenda Item Type
Domestic Violence: Firearms Relinquishment in Criminal Protective Order Cases	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. Rules of Court, rule 4.700	July 1, 2010
Recommended by	Date of Report
Domestic Violence Practice and Procedure Task Force	March 12, 2010
Hon. Laurence Donald Kay (Ret.), Chair	Contact
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Executive Summary

The Domestic Violence Practice and Procedure Task Force recommends the adoption of rule 4.700 to provide a procedure for courts issuing criminal protective orders in domestic violence cases to assist them in determining whether the defendant has complied with the court's order to relinquish or sell any firearms the defendant owns, possesses, or controls. Under the proposed rule, the court would set a review hearing to determine compliance with its order only in those limited cases where the court, in its discretion, has "good cause to believe" that the defendant owns, possesses, or controls a firearm that must be relinquished under the terms of the court's protective order. The rule, proposed as part of the task force's efforts to implement the recommendations in its final report, would fill a gap in the underlying statute, Code of Civil Procedure section 527.9; establish a uniform statewide procedure; and help protect victims and ensure public safety.

Recommendation

The Domestic Violence Practice and Procedure Task Force recommends that the Judicial Council, effective July 1, 2010, adopt California Rules of Court, rule 4.700, to assist courts issuing criminal protective orders by (1) providing procedures for setting and conducting review hearings to determine a defendant's compliance with the court's order to relinquish firearms, and (2) providing remedies for noncompliance.

The text of the proposed rule is attached at pages 12–14.

Previous Council Action

On September 6, 2005, Chief Justice Ronald M. George, in response to the June 2005 California Attorney General report¹ on how local criminal justice systems respond to domestic violence across the state, appointed the Domestic Violence Practice and Procedure Task Force to recommend changes to improve court practice and procedure in cases involving domestic violence allegations. The task force, in fulfilling its charge, developed guidelines and recommended practices to, among other things, improve court inquiry and review procedures regarding defendant firearm ownership and mandatory relinquishment by defendants subject to criminal protective orders.

In February 2008, the Judicial Council unanimously accepted the final report of the task force and directed the task force to implement the guidelines through various means, including rules of court.² The proposed rule provides guidance for courts regarding mandatory firearm relinquishment in criminal protective order matters.

Rationale for Recommendation

Lack of guidance in the governing statutes

Penal Code section 136.2 is intended “to protect victims and witnesses in connection with . . . [a] criminal proceeding . . . in order to allow participation without fear of reprisal.”³ When a defendant is charged with a crime of domestic violence, this statute places an affirmative duty on the court to consider issuing, on its own motion, a criminal protective order upon “a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.” (Pen. Code, § 136.2(a)(7)(B).) And when the charge involves domestic violence, the court “may consider,” in determining good cause, the underlying nature of the offense charged and the defendant's history, including prior convictions for domestic violence and other forms of violence or weapons offenses. (Pen. Code, § 136.2(h).) The district

¹ Task Force on Local Criminal Justice Response to Domestic Violence, Off. of Cal. Atty. Gen., *Keeping the Promise: Victim Safety and Batterer Accountability* (June 2005). As of October 15, 2008, the Crime and Violence Prevention Center within the California Attorney General's Office was no longer in operation and the report is no longer posted online.

² See Domestic Violence Practice and Procedure Task Force, Judicial Council of Cal., *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases* (Jan. 2008), at www.courtinfo.ca.gov/jc/documents/reports/022208item9.pdf.

³ *People v. Stone* (2004) 123 Cal.App.4th 153, 159.

attorney or prosecuting city attorney is required to provide the court with that information, along with information about “any current protective or restraining order issued by any civil or criminal court” whenever the court issues a protective order under Penal Code section 136.2. (Pen. Code, § 273.75(a)(3).)

Under Penal Code section 136.2(d)(1), anyone subject to a criminal protective order⁴ is prohibited from owning, possessing, purchasing, or receiving a firearm except under rare circumstances. Additionally, the court is *required* to order a defendant subject to a criminal protective order to relinquish any firearm in that person’s immediate possession or control, or subject to that person’s immediate possession or control, within 24 hours of being served with the order, either by surrendering the firearm to the control of local law enforcement officials or by selling the firearm to a licensed gun dealer. (Code Civ. Proc., § 527.9(b).) The defendant *must* file with the court a receipt showing that the firearm was surrendered to the local law enforcement agency or sold to a licensed gun dealer within 48 hours of receiving the order. (*Ibid.*)

There is no provision in either Penal Code section 136.2 or Code of Civil Procedure section 527.9 for a procedure to ensure that the court’s order to relinquish firearms has been followed.

Failure to enforce relinquishment order could threaten public safety

Very few courts have a procedure by which to identify whether a defendant has firearms and, if so, whether the firearms have been relinquished. A person protected by a restraining order may believe that when the court orders the defendant to relinquish any firearms, law enforcement and the courts will take steps to ensure that the order is followed. The protected person may rely on the firearm relinquishment order to believe that a firearm is no longer a threat to his or her safety. The failure to take steps to enforce an order to relinquish firearms in a criminal protective order case could pose a serious threat to public safety, in addition to the safety of protected persons.

Growing national issue

Concern about the challenge of firearm relinquishment in domestic violence cases is not limited to California. It is an emerging trend across the country. As part of the federal Violence Against Women Act of 1994, Congress strengthened the federal gun control law to prohibit possession of firearms and ammunition by persons subject to protection orders that meet certain criteria. Congress again amended the Gun Control Act in 1996 to prohibit anyone previously convicted of a misdemeanor crime of domestic violence from possessing a firearm or ammunition.

Other states, too, are struggling with the issue.⁵ Some have passed no legislation, some have passed legislation narrower in scope than the federal law, and some have passed legislation more

⁴ “Criminal protective order” means an order issued pursuant to Penal Code section 136.2.

⁵ See Off. on Violence Against Women, U.S. Dept. of Justice, *Enforcing Domestic Violence Firearm Prohibitions: A Report on Promising Practices* (Sept. 2006) at www.bwjp.org/files/bwjp/articles/Enforcing_Firearms_Prohibitions.pdf. That report indicates that King County, Washington, and Miami-Dade County, Florida, have used procedures almost identical to that being proposed in rule 4.700; King County’s procedure was initiated in 2003, Miami-Dade County’s procedure sometime after 1992.

comprehensive than the federal law. California has seen the development of significant legislation in this area over the last 15 years, and some California courts have developed successful local protocols for firearms relinquishment including procedures similar to those in the proposed rule.

Proposed rule 4.700

Proposed rule 4.700 provides a narrowly tailored procedure to implement Penal Code section 136.2, which requires an order to relinquish firearms in every case in which a criminal protective order is issued. The statute is silent on how those orders should be enforced. The task force has carefully attempted to strike a workable balance between the very serious public safety concerns at issue—allegations of domestic violence and good cause to believe that a defendant has a prohibited firearm—and competing interests, including a defendant’s Fifth Amendment privilege against self-incrimination and due process rights. In domestic violence cases, unlike many other cases, the court has an affirmative duty to take steps to ensure the safety of victims and witnesses. The proposed rule would assist the court with that duty by:

- Providing a procedure to set a review hearing if there is good cause to believe that a defendant subject to a criminal protective order has a firearm within his or her immediate possession or control;
- Providing procedures to follow at the review hearing to determine whether a defendant has complied with the court’s order to relinquish or sell firearms;
- Providing remedies to be applied if the court finds that a defendant has failed to relinquish a firearm, depending on whether the criminal protective order was issued preconviction under Penal Code section 136.2 or postconviction as a condition of probation under Penal Code section 1203.097.

Comments, Alternatives Considered, and Policy Implications

Comments

During the development of the proposed rule, the task force sought counsel and guidance from several sources. In addition to seeking formal comments on the rule during the two-month comment period, the task force held regional meetings, titled Domestic Violence and the Courts 2009: Focus on Firearm Relinquishment and Criminal Procedure, in Sacramento on June 11 and in Irvine on June 18. The meetings were well attended by representatives from rural and urban courts, law enforcement and probation, and district attorney and public defender offices. Participants expressed significant support for the rule.

During the two-month comment period, the task force sought comment on the proposed rule from a wide array of persons interested in the subject matter, including justices, judges, court administrators, attorneys, law enforcement and probation, and members of the public. The invitation to comment was posted on the California Courts Web site, and the comment period extended from April 17 through June 17, 2009. During this formal comment period, the task

force received 12 written comments. Of those comments, 7 were in agreement with the proposed rule, 3 did not indicate their positions, 1 indicated agreement if modifications were made, and 1 disagreed with the proposed rule in its entirety. The task force reviewed and analyzed the comments and, in response to some of them, revised the draft rule. A chart summarizing the comments received and the task force's responses is attached at pages 15–23.

Overall, the comments were exceedingly supportive of the proposed rule. Two comments were notable for the concerns they expressed. One of the commentators, a judge, did not indicate a position on the rule but expressed concerns about the version of the rule that went out for comment, including whether the burden of proof is shifted to the defendant and whether the rule violates a defendant's Fifth Amendment privilege against self-incrimination. The commentator who opposed the rule in its entirety, the Orange County Public Defender's Office, cited similar concerns.

The task force also consulted with the Criminal Law Advisory Committee (CLAC). Although CLAC was not initially asked to take a formal position on the rule, the task force discussed the rule with the advisory committee in April 2009, and CLAC discussed it again in July 2009 after the comment period, sharing concerns about the proposed rule on both occasions. The task force diligently attempted to address those concerns. When this proposal went before the Rules and Projects Committee (RUPRO) on September 8, 2009, RUPRO members expressed concern that CLAC had not taken a formal position on the rule and requested that the task force formally present the rule to the advisory committee before RUPRO considered the proposal. This formal presentation took place on November 6, 2009, and CLAC voted 8 to 5 to support the rule. The issues raised on both sides of the vote are generally addressed in the next sections of this report and in Attachment C.

When the task force again presented this proposal to RUPRO on February 2, 2010, some RUPRO members had concerns about the proposed rule and declined to recommend forwarding the proposal to the Judicial Council in the form it had been presented. The task force considered RUPRO's concerns to be well taken and revised the rule in response. The revised rule went before the Criminal Law Advisory Committee (CLAC) on February 19, 2010. CLAC voted 7 to 2 to support it.

The following is a list of concerns raised in the regional meetings, by formal commentators, by CLAC, and by RUPRO about earlier versions of the rule. The rule that is before the Judicial Council today has been revised in response to these concerns.

Setting a review hearing

What constitutes sufficient "cause" to conduct a review hearing? Two commentators, some participants in the regional meetings, and some members of CLAC expressed concern that the rule did not adequately address what constituted sufficient cause to set a review hearing. The language in the rule tracks the "good cause to believe" language of the underlying statute, Penal Code section 136.2. The statute does not define it further but leaves it to the discretion of the court. The task force has not provided further guidance about the meaning of "good cause to

believe,” in favor of leaving that decision to the discretion of the court in each case, in accordance with the existing statute.

In-custody defendants. In response to concern from members of RUPRO that the rule did not adequately address the situation in which a defendant is in custody and unlikely to be released in time to meet the 24-hour relinquishment time frame and the two-court-day time frame for filing proof of relinquishment, the task force added language to the rule that if there is good cause to believe that a defendant has a firearm and he or she is in custody at the time the criminal protective order is issued, “the court should order the defendant to appear for a review hearing within two court days after the defendant’s release from custody.”

In response to concern from CLAC members that many courts do not have a local procedure to determine when defendants are released from custody, the task force added an advisory committee comment to give courts notice that they may need to develop a local procedure to calendar review hearings when the defendant will be in custody beyond the two-court-day time frame for proving relinquishment required by Code of Civil Procedure section 527.9.

Review hearing

Standard of proof. Some commentators were concerned that the rule did not articulate a standard of proof for the judge to apply at the review hearing to determine whether (1) a defendant has any firearms in his or her custody, control, or possession; and, if so, (2) he or she has complied with the court’s order to relinquish those firearms. Under Penal Code section 136.2, the court has an affirmative duty to consider issuing a criminal protective order upon “a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.” (Pen Code, § 136.2(a)(7)(B).) The other underlying statute, Code of Civil Procedure section 527.9, has no procedure that would require a standard of proof. The task force left the rule silent on the standard of proof, leaving it to the “good cause belief” standard articulated in Penal Code section 136.2.

Under the rule, the court would set a review hearing only if, at the time it issues a criminal protective order, it has “good cause to believe” that the defendant owns, possesses, or controls any firearms. The defendant would then have 24 hours to comply with the court’s order to relinquish or sell any firearms in his or her possession, custody, or control. If, at the review hearing, the court still has “good cause to believe” that the defendant owns, possesses, or controls any firearms and “good cause to believe” that the defendant has not complied with the court’s order to relinquish them, the court would proceed to impose an appropriate remedy under proposed rule 4.700(d).

Burden of proof. Prior to the circulation for comment, the rule did not identify the party having the burden of proof at the review hearing. In response to concerns that the rule might have the effect of shifting the burden to the defendant, the task force revised the rule after circulation for comment to specifically state that the burden of proof at a review hearing is on the prosecution. (See proposed rule 4.700(d)(3).)

Bifurcation of remedies. RUPRO raised a concern that the remedies stated in the rule that went out for comment were incomplete because they did not address the situation in which a criminal protective order is issued as a condition of probation under Penal Code section 1203.097. In response, the task force added a remedy to address this situation. Specifically, it bifurcated the remedies of rule 4.700(d) as follows:

- Rule 4.700(d)(1) applies to preconviction defendants when the criminal protective order is issued under Penal Code section 136.2. Under proposed rule 4.700(d)(1), if at the review hearing the court finds that the defendant has a firearm that has not been relinquished and, therefore, has violated the terms of the criminal protective order, the court may revoke or increase bail. The court may also issue a bench warrant if the defendant does not appear at the hearing and the court orders revocation of bail. A review hearing under this section is similar to a bail hearing under Penal Code section 1275, and a finding is within the discretion of the court.⁶
- Rule 4.700(d)(2) applies to postconviction defendants who are issued a criminal protective order as a condition of probation. At the review hearing the court would initially determine, using the “good cause belief” standard articulated in Penal Code section 136.2, whether the defendant has a firearm that has not been relinquished. If the court makes such a finding, it would then proceed under Penal Code section 1203.097, which governs probation in domestic violence cases, and would calendar “as a priority calendar item”⁷ a hearing to determine whether further sentencing should proceed.

General concerns

Fifth Amendment privilege against self-incrimination. During development of the proposed rule, the task force discussed the implications of the defendant’s privilege against self-incrimination under the Fifth Amendment of the United States Constitution. The task force heard concerns on this issue from a number of commentators. Specific concerns included: (1) that the rule shifts the burden to the defendant to prove that he or she does not have a firearm, obliging the defendant to testify in order to avoid punishment; (2) that the requirement in the underlying statute, Code of Civil Procedure section 527.9, that defendant must file a receipt within 48 hours proving that his or her firearms have been relinquished violates that defendant’s privilege against self-incrimination; and (3) that even if filing a receipt does not violate the privilege by itself, in a case in which the defendant is a convicted felon who has a lifetime ban on owning firearms, or

⁶ Decisions about setting, reducing, or denying bail are within the discretion of the judge, who “shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. The public safety shall be the primary consideration.” (Pen. Code, § 1275(a).) Review hearings for postconviction defendants will, if the court makes a finding that the defendant has a firearm that has not been relinquished, trigger an evidentiary hearing under Penal Code section 1203.097(a)(12) to determine whether a violation of a condition of probation that could lead to further sentencing and revocation of probation has occurred. (See proposed rule 4.700(d).)

⁷ Pen. Code, § 1203.097(a)(12).

has unregistered firearms, filing a receipt showing the sale or relinquishment of those firearms would constitute incriminating evidence in violation of the defendant's Fifth Amendment privilege.

Regarding the first concern, that the burden shifts to defendant to prove that he or she does not have a firearm, the task force clarified in the rule that the burden is on the prosecution to prove that the defendant has a firearm and has failed to relinquish it. (See proposed rule 4.700(d)(3).) The defendant may remain silent throughout the review hearing; therefore the privilege against self-incrimination is not triggered on that ground.

As to the concern that filing a receipt triggers the Fifth Amendment, the underlying statute mandating the relinquishment of firearms in criminal protective order cases, Code of Civil Procedure section 527.9, specifies that a defendant ordered to relinquish firearms "shall file with the court a receipt showing the firearm was surrendered to the local law enforcement agency or sold to a licensed gun dealer within 48 hours after receiving the order." (Code Civ. Proc., § 527.9(b).) None of the legislative analyses of the statute indicate that the Legislature considered granting use immunity in Civil Code section 527.9, although it did do so in an earlier statute, Family Code section 6389, which also required firearm relinquishment in the context of civil protective orders. (See Fam. Code, § 6389(d).) However, the task force concluded that the receipt-filing requirement is nontestimonial and thus does not trigger the Fifth Amendment privilege against self-incrimination in any case. "[T]he privilege is a bar against compelling 'communications' or 'testimony,' but . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (*Schmerber v. California* (1966) 384 U.S. 757, 761.) Many behaviors and disclosures have been found to be non-testimonial in nature in numerous cases. For example, courts have held that it is not a Fifth Amendment violation for the government to require an individual to:

- Provide fingerprints (*People v. Bryant* (1969) 275 Cal.App.2d 215);
- Give blood samples (*Schmerber v. California* (1966) 384 U.S. 757);
- Stand in a lineup (*United States v. Wade* (1967) 388 U.S. 218);
- Produce handwriting exemplars (*Gilbert v. California* (1967) 388 U.S. 263);
- Wear certain clothing (*Holt v. United States* (1910) 218 U.S. 245; *People v. White* (1968) 69 Cal.2d 751); or
- Turn over records or other items (*Fisher v. United States* (1976) 425 U.S. 391).

Under the statute, the defendant is not required to file any statement under penalty of perjury, simply a receipt from either law enforcement or a licensed gun dealer acknowledging the receipt of the defendant's firearms.

Finally, the task force concluded that the third concern—that if the restrained person filing a receipt is a convicted felon, thus prohibited from possessing firearms for life, or is in possession of unregistered firearms, including serial numbers, that receipt would provide the government

with incriminating evidence against that person in violation of the Fifth Amendment—would not trigger the privilege. This is because the underlying statutes are part of a regulatory scheme to protect victims, witnesses, and the public by taking firearms out of the hands of alleged abusers in very volatile domestic violence cases; the statutes are not meant to facilitate criminal convictions. “[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.” (*United States v. Hubbell* (2000) 530 U.S. 27, 35.)

For example, in *California v. Byers* (1971) 402 U.S. 424, the U.S. Supreme Court decided a California case where the key issue was whether the state’s ‘hit and run’ statutes, requiring a driver involved in an accident to report the accident and provide identification, violated the Fifth Amendment privilege against self-incrimination. The Supreme Court held that even if the statute requiring a motorist involved in an accident to stop and give his name involved self-incrimination, the disclosure was not “testimonial” within the scope of the privilege. (*Id.* at p. 432.) The Court noted that although the Vehicle Code defined some criminal offenses, the statute was essentially regulatory, not criminal, and the statute at issue “was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents.” (*Id.* at p. 430.) The Court held that the required disclosure did not violate the Fifth Amendment because “the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.” (*Id.* at p. 431.)

Similarly, the proposed rule’s underlying statute, Code of Civil Procedure section 527.9, is not intended to facilitate criminal convictions but rather to safely facilitate the removal of firearms from persons who are subject to civil or criminal protective orders for domestic violence. And even Penal Code section 136.2, which also underlies the task force’s rule, is not intended to punish criminals, but “to protect victims and witnesses in connection with . . . [a] criminal proceeding . . . in order to allow participation without fear of reprisal.” (*People v. Stone* (2004) 123 Cal.App.4th 153, 159.) Here, too, self-reporting is indispensable to the fulfillment of the statutory purpose. The central purpose of the rule’s underlying statutes is to further California’s vital interest in ensuring public safety as well as preserving the integrity of the judicial process by protecting victims and witnesses involved in domestic violence cases.

Under the proposed rule, the defendant can remain silent throughout the hearing. The rule does not require that the court ask any questions of the defendant at the hearing, and the burden is on the prosecution to show that the defendant has an unrelinquished firearm. The court “may” order the preconviction defendant to attend the hearing and “should” order the postconviction defendant to attend the hearing.⁸ That is not unprecedented when allegations of domestic violence are involved. As an example, a defendant’s presence at arraignment and sentencing in a misdemeanor domestic violence case is mandatory⁹ but is generally not required in other

⁸ Cal. Rules of Court, proposed rule 4.700(c)(3).

⁹ Pen. Code, § 977(a)(2).

misdemeanor criminal cases. The defendant in a domestic violence case is also required to be present at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Penal Code section 136.2.¹⁰ The defendant's presence at a hearing helps facilitate the court's important and somewhat unique victim protection role in domestic violence cases.

Court congestion. CLAC expressed concern about the potential for increased court congestion from the additional hearings that may be held as the result of proposed rule 4.700. The task force declined to revise the rule in response to that concern, concluding that the burden of additional court hearings in the limited circumstances where the court has good cause to believe that the defendant possesses a firearm would be outweighed by the serious public safety considerations inherent in domestic violence cases. The task force also considered the experience of courts that have implemented local rules that are similar to rule 4.700. In every case, judicial officers in those courts report that the increase in hearings from implementation of the local rule has been minimal. Courts that have implemented local rules similar to proposed rule 4.700 include the Superior Courts of San Diego, San Francisco, Ventura, Orange, and Santa Clara Counties.

Ethical and practical concerns. Some members of CLAC expressed concern that the rule would create ethical and practical concerns for the courts, particularly in those courts where prosecutors and defense attorneys are not present at the initial stages of the proceedings. The task force concurs but does not believe that the answer is to jettison the rule. In its unanimously accepted final report, the task force included a recommendation to the Judicial Council that defense counsel and prosecution should be present at arraignment. In those few counties where counsel are not currently present at arraignment, the task force believes that the court could remedy the problem with special calendaring in those cases where the court, finding good cause to believe that the defendant possesses a prohibited firearm, wishes to set a review hearing at which counsel need to be present. This is an issue that also could be addressed as courts develop local procedures to handle review hearings for defendants in custody as suggested in the proposed rule's advisory committee comment—for example, by requiring counsel to be present at arraignment in domestic violence cases.

Casting the court in an investigative role. Some members of CLAC were concerned that the requirements of proposed rule 4.700, which rely on the court to determine whether there is good cause to believe that a defendant has possession of or immediate access to a firearm, puts the court in an improper investigative role, a role reserved for prosecution and law enforcement, thereby blurring the perception of the court's impartiality. The task force agrees that the courts have a necessary and important role in ensuring public safety but are not investigative or enforcement agencies. Nevertheless, courts have an affirmative duty, under existing Penal Code section 136.2 and Code of Civil Procedure section 527.9, to take steps to ensure the safety of victims and witnesses in domestic violence cases. Neither of those statutes specifies a procedure to ensure compliance with the court's mandatory order to relinquish firearms on issuance of a

¹⁰ *Ibid.*

criminal protective order. The task force believes that proposed rule 4.700 is narrowly tailored to provide a simple procedure for the court to do just that. The task force does not believe that the rule puts the court in an improper investigative role but does believe that, to the extent the rule requires something more than the court's usual neutral role in criminal proceedings, the potential benefit of possibly saving lives in these risk-laden cases, coupled with the unique role of the court in preserving the integrity of the judicial process in domestic violence cases, more than tips the scale in favor of approving the rule.

Alternative actions considered

As noted above, during development of the proposed rule, the task force discussed the effect of additional review hearings on court congestion and concluded that the burden of additional court hearings in the limited circumstances specified by the proposed rule would be far outweighed by the serious public safety considerations inherent in these matters. The proposed rule would require a review hearing only in a case where the court finds good cause to believe that the defendant has a firearm in his or her immediate possession or control—precisely the cases that pose a serious risk of lethality.

Implementation Requirements, Costs, and Operational Impacts

Implementation of the rule will require additional discretionary review hearings, and, in those counties that have not already implemented similar procedures, may require education and training of court personnel.

Attachments

1. Cal. Rules of Court, rule 4.700, at pages 12–14
2. Chart of comments, at pages 15–23
3. Attachment A: Penal Code section 136.2
4. Attachment B: Code of Civil Procedure section 527.9
5. Attachment C: CLAC memorandum to RUPRO

Rule 4.700 of the California Rules of Court would be adopted, effective July 1, 2010, to read:

1 **Rule 4.700. Firearm relinquishment procedures for criminal protective**
2 **orders**

3
4 **(a) Application of rule**

5
6 This rule applies when a court issues a criminal protective order under Penal
7 Code section 136.2 during a criminal case or as a condition of probation
8 under Penal Code section 1203.097(a)(2) against a defendant charged with a
9 crime of domestic violence as defined in Penal Code section 13700.

10
11 **(b) Purpose**

12
13 This rule is intended to:

- 14
15 (1) Assist courts issuing criminal protective orders to determine whether a
16 defendant subject to such an order owns, possesses, or controls any
17 firearms; and
18
19 (2) Assist courts that have issued criminal protective orders to determine
20 whether a defendant has complied with the court's order to relinquish
21 or sell the firearms under Code of Civil Procedure section 527.9.

22
23 **(c) Setting review hearing**

- 24
25 (1) At any hearing where the court issues a criminal protective order, the
26 court must consider all credible information, including information
27 provided on behalf of the defendant, to determine if there is good cause
28 to believe that the defendant has a firearm within his or her immediate
29 possession or control.
30
31 (2) If the court finds good cause to believe that the defendant has a firearm
32 within his or her immediate possession or control, the court must set a
33 review hearing to ascertain whether the defendant has complied with
34 the requirement to relinquish the firearm as specified in Code of Civil
35 Procedure section 527.9. Unless the defendant is in custody at the time,
36 the review hearing should occur within two court days after issuance of
37 the criminal protective order. If circumstances warrant, the court may
38 extend the review hearing to occur within 5 court days after issuance of

1 local law enforcement or sell to a licensed gun dealer any firearm owned or subject to his or her
2 immediate possession or control within 24 hours after service of this order and must file a receipt
3 with the court showing compliance with this order within 48 hours of receiving this order.”

4
5 Courts are encouraged to develop local procedures to calendar review hearings for defendants in
6 custody beyond the two-court-day time frame to file proof of firearms relinquishment with the
7 court under Code of Civil Procedure section 527.9.

SPR09-30**Domestic Violence: Firearms Relinquishment in Criminal Cases** (adopt Cal. Rules of Court, rule 4.700)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	County of San Diego Probation Dept. Juvenile Field Services by Pamela Martinez, DCPO	NI	[*This rule would have no impact on the probation department.] This rule identifies court process for defendants to relinquish firearms for courts issuing criminal protective orders.	
2.	Hon. Erick Larsh, Judge Superior Court of Orange County	NI	<p>The proposed Rule requires the court to set a hearing when “good cause exists to believe that the defendant is in possession of a firearm” in order to determine whether or not the defendant has relinquished the firearm. If proof of relinquishment is not provided at the hearing, the court may make further orders with regard to the modification or revocation of bail or probation.</p> <p>Initially, it should be noted that the evidence that constitutes good cause might consist of any of the following: a victim’s statement that the defendant has a gun; a defendant’s statement to the police that he/she has a gun; a witness statement that the defendant has a gun; a statement to a 911 operator that the defendant is armed; or a Department of Justice Automated Firearms System (AFS) printout stating the defendant has had a gun registered to him/her at some time in his or her life.</p>	<p>To provide more clarity, in response to this comment and others, the committee has modified the rule to state explicitly that the burden of proof is on the prosecution.</p> <p>The proposed rule does not shift the evidentiary burden to the defendant. Rather, it requires a two-part process of the court. First, the court must find “good cause to believe” that the defendant has a firearm before setting a review hearing. That “good cause belief” is the standard articulated in Penal Code section 136.2. Second, if the court finds “good cause to believe” that the defendant has a firearm, it must set a review hearing (allowing defendant the 24-hour period of time to relinquish that firearm). If at the review hearing the court</p>

SPR09-30

Domestic Violence: Firearms Relinquishment in Criminal Cases (adopt Cal. Rules of Court, rule 4.700)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			<p>Each of these types of evidence may raise significant issues if offered as proof of defendant’s present ownership or possession of a firearm – such as the fact that the AFS printout is not automatically updated to show the prior sale or disposition of the listed firearm. When the court sets the hearing, however, the purpose is to receive proof that defendant has relinquished the firearm – implying that sufficient proof to show present ownership or possession of the firearm has already been received. Thus, the burden is shifted to the defendant to show that he does not have a firearm. Is this appropriate? Do we violate the defendant’s right against self incrimination under the 5th Amendment by shifting that burden – obliging the defendant to testify in order to avoid punishment?</p>	<p>still has a “good cause belief” that defendant has a firearm and finds based on a good cause belief that the defendant has failed to relinquish it, the court will consider revoking bail or probation or taking any other steps. At that review hearing, the prosecution has the burden of proving both that the defendant had a firearm and that he or she failed to relinquish it. Decisions about setting, reducing, or denying bail are within the discretion of the judge, who “shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. The public safety shall be the primary consideration.” (Cal. Pen. Code § 1275(a).) Again, the burden of proof is not on the defense, but is explicitly on the prosecution, which eliminates any encroachment on the defendant’s 5th Amendment rights. In the case of a possible violation of the terms of probation under Penal Code section 1203.097, the court’s finding that the probationer has failed to relinquish firearms as required by the criminal protective order would trigger the Penal Code section 1203.097(a)(12) procedures that could lead to further sentencing.</p>

SPR09-30**Domestic Violence: Firearms Relinquishment in Criminal Cases** (adopt Cal. Rules of Court, rule 4.700)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			<p>If the judge feels uncomfortable revoking bail and/or probation and remanding the defendant upon the initial good cause showing, in and of itself, it goes to show that the “good cause to believe” standard is not strong enough for us to feel comfortable interfering with the liberty and due process rights of the defendant or obliging him to waive his 5th Amendment rights in order to rebut this evidence.</p>	<p>As noted above, the court would not be considering revocation of bail or probation when it sets the review hearing. Under Code of Civil Procedure section 527.9, the defendant has 24 hours after the criminal protective order is issued to relinquish or sell any firearms in his or her possession or control. Thus, it would be premature for the court to revoke bail or probation before the defendant has the opportunity to dispose of the firearm(s). However, at the review hearing, if the court finds, on the “good cause belief” standard that a defendant has failed to relinquish a firearm as ordered, it could then either revoke bail under Penal Code section 1275 in the case of a pre-conviction defendant, or proceed under Penal Code section 1203.097 in the case of a post-conviction probationer.</p>
3.	Julie Netchaev (no additional information provided)	A	<p>I think this is one area that anything and everything that can be done should be done. While restrained parties are advised that</p>	No response required.

SPR09-30**Domestic Violence: Firearms Relinquishment in Criminal Cases** (adopt Cal. Rules of Court, rule 4.700)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			they are not to be in possession of a firearm, they often end up keeping weapons they may already have, registered or unregistered, and in most cases there is no follow up with that person to verify the firearms were turned or sold. Any organized plan to follow up and at least attempt to ensure the restrained party does not have access to firearms could help prevent further devastating injuries to victims and/or survivors of abuse.	
4.	Office of the District Attorney County of Ventura, State of California by Michael D. Schwartz, Special Assistant District Attorney	A	I fully support this rule, which requires review hearings to determine whether domestic violence defendants who are ordered to relinquish their firearms have actually done so. At the present, there is virtually no follow-up to determine if the court's order has been followed, and only a tiny percentage of defendants file the required receipt.	No response required.
5.	Orange County Bar Association by Michael G. Yoder, President	A	No additional comments.	No response required.
6.	Orange County Public Defender's Office by Deborah A. Kwast, Public Defender	N	The Orange County Public Defender's Office wishes to make the following comments concerning the proposed adoption of California Rule of Court 4.700: We disagree with this proposed rule in its	

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Domestic Violence: Firearms Relinquishment in Criminal Cases (adopt Cal. Rules of Court, rule 4.700)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			<p>entirety. Although we certainly appreciate the policy reasons why such a rule would be contemplated, the proposed rule has a host of problems that make it problematic at best, and unconstitutional at worst.</p> <p>First, the rule does not define what “good cause” means for purposes of setting a review hearing. Does it mean “probable cause”? Does it mean “good cause” as that phrase is used in Penal Code sections, such as section 1050?</p> <p>Second, the rule does not clarify what the review hearing should include. For example, may witnesses be called at such a hearing?</p>	<p>See response to commentator #2.</p> <p>The review hearing proposed in this rule would involve the court using the “good cause to believe” standard in Penal Code section 136.2 to balance the need to protect the rights of the accused, while still focusing on protecting victims. In the case of a pre-conviction defendant where the court had “good cause to believe” that the defendant both had a firearm and had failed to relinquish it, the court would apply the bail hearing balancing under Penal Code section 1275 and would make a decision about bail revocation. And in the case of a probationer, a finding of a failure to relinquish a firearm (using the “good cause to believe” standard) would trigger a specific procedure required for</p>

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Domestic Violence: Firearms Relinquishment in Criminal Cases (adopt Cal. Rules of Court, rule 4.700)

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	Commentator	Position	Comment	Committee Response
			<p>Third, the rule does not define the standard of proof to be followed by the judge in making his finding.</p> <p>Courts will be tempted, in the absence of rules that tell them otherwise, to hold such review hearings if they have the slightest suggestion that a defendant may have a</p>	<p>revocation of probation and further sentencing under Penal Code section 1203.097(a)(12). In both instances, the burden of proving that the defendant had a firearm and failed to relinquish it is on the prosecution.</p> <p>The standard of proof for both the setting of the review hearing and for the review hearing itself is that articulated in the underlying statute, Penal Code section 136.2, a “good cause belief.” Then, depending on whether the hearing involves a pre-conviction defendant or a post-conviction probationer, if the court has a “good cause belief” that there is a firearm that has not been relinquished, the court would apply the balancing of a bail hearing under Penal Code section 1275 or would set a hearing under Penal Code section 1203.097(a)(12) to determine whether there should be a revocation of probation and further sentencing. Again, in both cases the prosecution would bear the burden of proving that defendant has a firearm and has failed to relinquish it.</p> <p>See response immediately above. See also response to commentator #2: First, the court must find “good cause to believe” that the defendant has a firearm before setting a</p>

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	Commentator	Position	Comment	Committee Response
			<p>weapon, and to make a finding of possession if there is any evidence supporting it, no matter how lacking in credibility or substance. The rule, as written, thus creates the risk that defendants may be imprisoned pending the outcome of their criminal proceedings based only on allegations supported by a minimum of evidence. This result is not wise from a public policy perspective, and not lawful from a constitutional perspective.</p> <p>The concerns of the Domestic Violence Practices and Procedure Task Force can be met by the courts conducting well-informed and thorough bail hearings which do not rely entirely on pre-written bail schedules but rather on consideration of all pertinent information, and which result in individual case-by-case decisions. In this way, the system can meet its dual duties of protection of the rights of those accused, but not convicted of a crime, and protection of victims, as well as of society as a whole.</p>	<p>review hearing. That “good cause belief” is the standard articulated in Penal Code section 136.2. Second, if the court finds “good cause to believe” that the defendant has a firearm, it must set a review hearing (allowing defendant the 24-hour period of time to relinquish that firearm). If at the review hearing the court still has a “good cause belief” that defendant has a firearm and finds based on a good cause belief that the defendant has failed to relinquish it, the court will consider revoking bail or probation or taking any other steps. At that review hearing, the prosecution has the burden of proving both that the defendant had a firearm and that he or she failed to relinquish it.</p> <p>Under Code of Civil Procedure section 527.9, the defendant has 24 hours after the criminal protective order is issued, often at arraignment, to relinquish or sell any firearms in his or her possession or control. Thus, it would be premature for the court to make a decision about revoking or denying bail or probation before the defendant has the opportunity to dispose of the firearm(s).</p>

SPR09-30**Domestic Violence: Firearms Relinquishment in Criminal Cases** (adopt Cal. Rules of Court, rule 4.700)

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	Commentator	Position	Comment	Committee Response
7.	State Bar of California Standing Committee on the Delivery of Legal Services (SCDLS) by Sharon Ngim, Program Developer & Staff Liaison	A	Domestic violence affects the most vulnerable portions of society, including the elderly and immigrants. They depend upon courts and law enforcement to protect them. Courts throughout the state have had varying degrees of success in establishing whether firearms have been relinquished as ordered. Rule 4.700 of the California Rules of Court will establish a uniform process for criminal courts to enforce a firearm relinquishment order in a criminal case. It will serve to better protect the vulnerable. Our only recommendation is that a similar procedure be proposed and implemented in our civil court to handle the numerous firearm relinquishment orders issued in civil Domestic Violence Prevention Act cases.	The proposed rule is limited to criminal proceedings. This comment will be referred to the appropriate committee for future consideration.
8.	Mary Stump	NI	Need clarification on this one. The title indicates “criminal law” and then references “restraining order cases.” Will this process only be implemented in criminal domestic violence cases? Or will it also apply to civil restraining order (DVRO) cases?	Subsection (a) of this rule states that it applies in criminal cases where there is a criminal protective order.
9.	Superior Court of Kern County by Christine Rodriquez, Assistant Court Supervisor	A	No additional comments.	No response required.
10.	Superior Court of Los Angeles	A	There are issues with the option of asking	In response to this and other similar

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All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
	County by Janet Garcia, Court Manager		the defendant to complete a pre-plea admission of possession of weapons/firearms.	comments, the rule has been modified to delete the section that provided that the court could take the matter off calendar if the defendant filed certain documents. The rule does not require a defendant to complete a pre-plea admission of possession of weapons/firearms.
11.	Superior Court of San Diego County by Mike Roddy	A	No additional comments.	No response required.
12.	TCPJAC/CEAC Joint Rules Working Committee	AM	The working group had a concern that this rule proposal will provide a false sense of security when in reality the court cannot know for certain whether any restrained person has a firearm(s) or not.	The committee hopes that this rule will provide more security for potential victims than the statute alone can provide, but certainly it cannot guarantee safety in these very difficult cases.

Attachment A: Penal Code section 136.2

136.2. (a) Except as provided in subdivision (c), upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following:

(1) Any order issued pursuant to Section 6320 of the Family **Code**.

(2) An order that a defendant shall not violate any provision of Section **136.1**.

(3) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, shall not violate any provisions of Section **136.1**.

(4) An order that any person described in this section shall have no communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose.

(5) An order calling for a hearing to determine if an order as described in paragraphs (1) to (4), inclusive, should be issued.

(6) An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim or a witness, or both, or for immediate family members of a victim or a witness who reside in the same household as the victim or witness or within reasonable proximity of the victim's or witness' household, as determined by the court. The order shall not be made without the consent of the law enforcement agency except for limited and specified periods of time and upon an express finding by the court of a clear and present danger of harm to the victim or witness or immediate family members of the victim or witness.

For purposes of this paragraph, "immediate family members" include the spouse, children, or parents of the victim or witness.

(7) (A) Any order protecting victims of violent crime from all contact by the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant. The court or its designee shall transmit orders made under this paragraph to law enforcement personnel within one business day of the issuance, modification, extension, or termination of the order, pursuant to subdivision (a) of Section 6380 of the Family **Code**. It is the responsibility of the court to transmit the modification, extension, or termination orders made under this paragraph to the same agency that entered the original protective order into the Domestic Violence Restraining Order System.

(B) (i) If a court does not issue an order pursuant to subparagraph (A) in a case in which the defendant is charged with a crime of domestic violence as defined in Section 13700, the court on its own motion shall consider issuing a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, that provides as follows:

(I) The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect.

(II) The defendant shall relinquish any firearms that he or she

owns or possesses pursuant to Section 527.9 of the **Code** of Civil Procedure.

(ii) Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive, a firearm while this protective order is in effect is punishable pursuant to subdivision (g) of Section 12021.

(C) Any order issued, modified, extended, or terminated by a court pursuant to this paragraph shall be issued on forms adopted by the Judicial Council of California and that have been approved by the Department of Justice pursuant to subdivision (i) of Section 6380 of the Family **Code**. However, the fact that an order issued by a court pursuant to this section was not issued on forms adopted by the Judicial Council and approved by the Department of Justice shall not, in and of itself, make the order unenforceable.

(b) Any person violating any order made pursuant to paragraphs (1) to (7), inclusive, of subdivision (a) may be punished for any substantive offense described in Section 136.1, or for a contempt of the court making the order. A finding of contempt shall not be a bar to prosecution for a violation of Section 136.1. However, any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed upon conviction of an offense described in Section 136.1. Any conviction or acquittal for any substantive offense under Section 136.1 shall be a bar to a subsequent punishment for contempt arising out of the same act.

(c) (1) Notwithstanding subdivisions (a) and (e), an emergency protective order issued pursuant to Chapter 2 (commencing with Section 6250) of Part 3 of Division 10 of the Family **Code** or Section 646.91 of the **Penal Code** shall have precedence in enforcement over any other restraining or protective order, provided the emergency protective order meets all of the following requirements:

(A) The emergency protective order is issued to protect one or more individuals who are already protected persons under another restraining or protective order.

(B) The emergency protective order restrains the individual who is the restrained person in the other restraining or protective order specified in subparagraph (A).

(C) The provisions of the emergency protective order are more restrictive in relation to the restrained person than are the provisions of the other restraining or protective order specified in subparagraph (A).

(2) An emergency protective order that meets the requirements of paragraph (1) shall have precedence in enforcement over the provisions of any other restraining or protective order only with respect to those provisions of the emergency protective order that are more restrictive in relation to the restrained person.

(d) (1) A person subject to a protective order issued under this section shall not own, possess, purchase, receive, or attempt to purchase or receive a firearm while the protective order is in effect.

(2) The court shall order a person subject to a protective order issued under this section to relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the **Code** of Civil Procedure.

(3) Every person who owns, possesses, purchases or receives, or attempts to purchase or receive a firearm while the protective order is in effect is punishable pursuant to subdivision (g) of Section 12021 of the **Penal Code**.

(e) (1) In all cases where the defendant is charged with a crime of domestic violence, as defined in Section 13700, the court shall consider issuing the above-described orders on its own motion. All interested parties shall receive a copy of those orders. In order to facilitate this, the court's records of all criminal cases involving domestic violence shall be marked to clearly alert the court to this issue.

(2) In those cases in which a complaint, information, or indictment charging a crime of domestic violence, as defined in Section 13700, has been issued, a restraining order or protective order against the defendant issued by the criminal court in that case has precedence in enforcement over any civil court order against the defendant, unless a court issues an emergency protective order pursuant to Chapter 2 (commencing with Section 6250) of Part 3 of Division 10 of the Family **Code** or Section 646.91 of the **Penal Code**, in which case the emergency protective order shall have precedence in enforcement over any other restraining or protective order, provided the emergency protective order meets the following requirements:

(A) The emergency protective order is issued to protect one or more individuals who are already protected persons under another restraining or protective order.

(B) The emergency protective order restrains the individual who is the restrained person in the other restraining or protective order specified in subparagraph (A).

(C) The provisions of the emergency protective order are more restrictive in relation to the restrained person than are the provisions of the other restraining or protective order specified in subparagraph (A).

(3) Custody and visitation with respect to the defendant and his or her minor children may be ordered by a family or juvenile court consistent with the protocol established pursuant to subdivision (f), but if ordered after a criminal protective order has been issued pursuant to this section, the custody and visitation order shall make reference to, and acknowledge the precedence of enforcement of, any appropriate criminal protective order. On or before July 1, 2006, the Judicial Council shall modify the criminal and civil court forms consistent with this subdivision.

(f) On or before January 1, 2003, the Judicial Council shall promulgate a protocol, for adoption by each local court in substantially similar terms, to provide for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims. The protocol shall include, but shall not be limited to, mechanisms for assuring appropriate communication and information sharing between criminal, family, and juvenile courts concerning orders and cases that involve the same parties, and shall permit a family or juvenile court order to coexist with a criminal court protective order subject to the following conditions:

(1) Any order that permits contact between the restrained person and his or her children shall provide for the safe exchange of the children and shall not contain language either printed or handwritten that violates a "no contact order" issued by a criminal court.

(2) Safety of all parties shall be the courts' paramount concern. The family or juvenile court shall specify the time, day, place, and manner of transfer of the child, as provided in Section 3100 of the Family **Code**.

(g) On or before January 1, 2003, the Judicial Council shall modify the criminal and civil court protective order forms consistent

with this section.

(h) In any case in which a complaint, information, or indictment charging a crime of domestic violence, as defined in Section 13700, has been filed, the court may consider, in determining whether good cause exists to issue an order under paragraph (1) of subdivision (a), the underlying nature of the offense charged, and the information provided to the court pursuant to Section 273.75.

Attachment B: Code of Civil Procedure section 527.9

527.9. (a) A person subject to a temporary restraining order or injunction issued pursuant to Section **527.6** or **527.8** of the Code of **Civil Procedure**, or subject to a restraining order issued pursuant to Section 136.2 of the Penal Code, or Section 15657.03 of the Welfare and Institutions Code, shall relinquish the firearm pursuant to this section.

(b) Upon the issuance of a protective order pursuant to subdivision (a), the court shall order the person to relinquish any firearm in that person's immediate possession or control, or subject to that person's immediate possession or control, within 24 hours of being served with the order, either by surrendering the firearm to the control of local law enforcement officials, or by selling the firearm to a licensed gun dealer, as specified in Section 12071 of the Penal Code. A person ordered to relinquish any firearm pursuant to this subdivision shall file with the court a receipt showing the firearm was surrendered to the local law enforcement agency or sold to a licensed gun dealer within 48 hours after receiving the order. In the event that it is necessary to continue the date of any hearing due to a request for a relinquishment order pursuant to this section, the court shall ensure that all applicable protective orders described in Section 6218 of the Family Code remain in effect or bifurcate the issues and grant the permanent restraining order pending the date of the hearing.

(c) A local law enforcement agency may charge the person subject to the order or injunction a fee for the storage of any firearm relinquished pursuant to this section. The fee shall not exceed the actual cost incurred by the local law enforcement agency for the storage of the firearm. For purposes of this subdivision, "actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and surrendering possession of the firearm to a licensed dealer as defined in Section 12071 of the Penal Code or to the person relinquishing the firearm.

(d) The restraining order requiring a person to relinquish a firearm pursuant to subdivision (b) shall state on its face that the respondent is prohibited from owning, possessing, purchasing, or receiving a firearm while the protective order is in effect and that the firearm shall be relinquished to the local law enforcement agency for that jurisdiction or sold to a licensed gun dealer, and that proof of surrender or sale shall be filed with the court within a specified period of receipt of the order. The order shall also state on its face the expiration date for relinquishment. Nothing in this section shall limit a respondent's right under existing law to petition the court at a later date for modification of the order.

(e) The restraining order requiring a person to relinquish a firearm pursuant to subdivision (b) shall prohibit the person from possessing or controlling any firearm for the duration of the order. At the expiration of the order, the local law enforcement agency shall return possession of any surrendered firearm to the respondent, within five days after the expiration of the relinquishment order, unless the local law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is prohibited from possessing a firearm because the respondent is in any prohibited

class for the possession of firearms, as defined in Sections 12021 and 12021.1 of the Penal Code and Sections 8100 and 8103 of the Welfare and Institutions Code, or (3) another successive restraining order is used against the respondent under this section. If the local law enforcement agency determines that the respondent is the legal owner of any firearm deposited with the local law enforcement agency and is prohibited from possessing any firearm, the respondent shall be entitled to sell or transfer the firearm to a licensed dealer as defined in Section 12071 of the Penal Code. If the firearm has been stolen, the firearm shall be restored to the lawful owner upon his or her identification of the firearm and proof of ownership.

(f) The court may, as part of the relinquishment order, grant an exemption from the relinquishment requirements of this section for a particular firearm if the respondent can show that a particular firearm is necessary as a condition of continued employment and that the current employer is unable to reassign the respondent to another position where a firearm is unnecessary. If an exemption is granted pursuant to this subdivision, the order shall provide that the firearm shall be in the physical possession of the respondent only during scheduled work hours and during travel to and from his or her place of employment. In any case involving a peace officer who as a condition of employment and whose personal safety depends on the ability to carry a firearm, a court may allow the peace officer to continue to carry a firearm, either on duty or off duty, if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. Prior to making this finding, the court shall require a mandatory psychological evaluation of the peace officer and may require the peace officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence.

(g) During the period of the relinquishment order, a respondent is entitled to make one sale of all firearms that are in the possession of a local law enforcement agency pursuant to this section. A licensed gun dealer, who presents a local law enforcement agency with a bill of sale indicating that all firearms owned by the respondent that are in the possession of the local law enforcement agency have been sold by the respondent to the licensed gun dealer, shall be given possession of those firearms, at the location where a respondent's firearms are stored, within five days of presenting the local law enforcement agency with a bill of sale.



Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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MEMORANDUM

Date	Action Requested
January 13, 2010	For Your Consideration
To	Deadline
Members of the Rules and Projects Committee	N/A
From	Contact
Criminal Law Advisory Committee Justice Steven Z. Perren, Chair Arturo Castro, Committee Counsel	Arturo Castro 415-865-7702 phone 415-865-7664 fax arturo.castro@jud.ca.gov
Subject	
Proposed California Rules of Court, rule 4.700	

On November 6, 2009, members of the Criminal Law Advisory Committee voted 8 to 5 to support proposed rule 4.700 as recommended by the Domestic Violence Practice and Procedure Task Force. Members who voted to support the proposed rule include four judges, a chief assistant attorney general, two district attorneys, and a court administrator. Members who voted to oppose the proposed rule include two judges, a public defender, an appellate counsel, and a private attorney. No other members participated in the discussion or voted. Because committee members and liaisons expressed various viewpoints in favor of and against the proposed rule, those viewpoints are summarized below for your consideration.

Support for the Proposed Rule

Members who support the proposed rule generally believe that it would provide courts with a valuable and much needed tool to enforce firearm relinquishment orders. Currently, few courts have procedures to identify which defendants have firearms or whether firearms have been relinquished. The proposed rule would help courts identify those defendants and enforce relinquishment orders promptly and effectively. In addition, revisions to the proposed rule have

significantly improved it, reducing its controversy among members of the committee. For example, to emphasize that it does not improperly shift the burden of proof to the defendant, the proposed rule expressly states that the burden at the review hearing is on the prosecution.

Additional reasons expressed in support of the proposed rule include the following topics.

Public Safety

Firearm relinquishment in domestic violence cases inherently enhances public safety. Because court orders alone do not ensure that defendants relinquish firearms, the proposed rule empowers courts to take additional measures to investigate whether certain defendants retain access to firearms. The public safety benefit of the proposed rule cannot be overstated—disarming domestic violence suspects saves lives. The proposed rule would inspire confidence in crime victims who frequently do not cooperate because of fear and a belief that court orders are ignored.

Calendar Management

The proposed rule would have no significant effect on trial court calendar management. The proposed rule would not require the court to conduct a hearing in every case, only in the limited number of domestic violence cases in which the court finds good cause to believe the defendant has a firearm. Local courts that have implemented comparable rules report that very few hearings actually occur, and when they do, the evidence is heard in only a few minutes. Even if the rule resulted in numerous hearings in certain courts, the benefits of firearm relinquishment outweigh potential calendar congestion.

Statutory Authority

Defendants subject to criminal protective orders are already required to file with the court proof of firearm relinquishment under Code of Civil Procedure section 527.9. The proposed rule simply implements existing statutory authority.

Self-incrimination

The proposed rule does not expressly conflict with the privilege against self-incrimination under the Fifth Amendment of the United States Constitution because defendants may elect to remain silent throughout the proceedings.

Opposition to the Proposed Rule

Members who expressed opposition to the proposed rule brought up the following concerns.

Lack of Need

The proposed rule is unnecessary for several reasons. First, violation of a protective order is a crime. A defendant who retains firearms in violation of a court order should be formally prosecuted or held in contempt. The well-established procedural safeguards of formal

prosecution best ensure balance between public safety and a fair adjudication. Crime investigation is an endeavor properly reserved for law enforcement and prosecutors, not courts. Second, existing statutory authority already empowers courts to review the custodial status of defendants to ensure the protection of the public. In addition, although Code of Civil Procedure section 527.9 requires defendants to file proof of relinquishment with the court, no statute requires the court to confirm relinquishment at a hearing. The Legislature would have prescribed a hearing requirement if it believed hearings were appropriate and intended courts to conduct them.

Calendar Congestion

The proposed rule would create calendar congestion, particularly in high-volume courts. Because it is expected that most defendants will remain silent to avoid self-incrimination, courts will be forced to set hearings in most cases. In a time of severe budget cuts, it is fiscally irresponsible to implement a rule that would strain the operational budgets of courts. The Judicial Council should not adopt the one-size-fits-all approach of a mandatory rule. Rather, courts that believe this procedure is necessary should be free to adopt local rules designed to address local needs and customs.

Constitutional Implications

The proposed rule may improperly implicate the privilege against self-incrimination. Without immunity, any evidence offered by the defendant at the hearing may be used against the defendant at the trial, at concurrent or future probation and parole revocation proceedings, and as a basis for new charges. Although the proposed rule does not require the defendant to offer evidence, it would effectively compel defendants to do so because remaining silent may result in detention or increased bail pending trial. Although defendants are already required to file proof of relinquishment with the court under Code of Civil Procedure section 527.9, without immunity, section 527.9 may be constitutionally flawed. Defendants who are convicted felons, for example, would be immediately incriminated if they offered proof of relinquishment without immunity. The Judicial Council should not adopt a rule that endorses a potentially fundamentally flawed statute. Any constitutional infirmities in the rule that flow from the statute may also lead to overturned convictions.

Ethical Quandaries

The proposed rule would create ethical quandaries for courts by casting courts in an improper investigative role, particularly in those courts where prosecutors and defense attorneys are not present at initial proceedings. Although an investigative role by the court may be appropriate after a grant of probation, such a role before conviction blurs the impartiality of the court.

Other Practical Concerns

Holding testimonial hearings so early in the proceedings would inadvertently create a discovery benefit for the defense, which would have a unique opportunity to cross-examine prosecution witnesses on the record just days after arraignment. Having hearings so early in the process also would raise concerns for nonindigent defendants, who frequently do not secure private counsel until well after the initial appearance.

Conclusion

The views summarized above were expressed by both members and liaisons, but only members formally voted. No viewpoint is attributed to any particular member or liaison, nor are all viewpoints in support or opposition attributable exclusively to members who voted in support or opposition. For example, some of the concerns about the proposed rule were expressed by members who ultimately voted to support it. Despite the variety of viewpoints, most members voted to support the rule. The committee appreciates the opportunity to share its diverse perspectives.

SZP/AC/ec