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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 23, 2010

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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 report<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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](http://www.courtinfo.ca.gov/jc/documents/reports/022208item9.pdf).

<sup>3</sup> *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 order<sup>4</sup> 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.<sup>5</sup> Some have passed no legislation, some have passed legislation narrower in scope than the federal law, and some have passed legislation more

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

<sup>5</sup> 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](http://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.<sup>6</sup>
- 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”<sup>7</sup> 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

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<sup>6</sup> 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).)

<sup>7</sup> 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.<sup>8</sup> 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 mandatory<sup>9</sup> but is generally not required in other

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<sup>8</sup> Cal. Rules of Court, proposed rule 4.700(c)(3).

<sup>9</sup> 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.<sup>10</sup> 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

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<sup>10</sup> *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 the criminal protective order. The court must give the defendant an  
2 opportunity to present information at the review hearing to refute the  
3 allegation that he or she owns any firearms. If the defendant is in  
4 custody at the time the criminal protective order is issued, the court  
5 should order the defendant to appear for a review hearing within two  
6 court days after the defendant’s release from custody.

7  
8 (3) If the proceeding is held under Penal Code section 136.2, the court  
9 may, under Penal Code section 977(a)(2), order the defendant to  
10 personally appear at the review hearing. If the proceeding is held under  
11 Penal Code section 1203.097, the court should order the defendant to  
12 personally appear.

13  
14 **(d) Review hearing**

15  
16 (1) If the court has issued a criminal protective order under Penal Code  
17 section 136.2, at the review hearing:

18  
19 (A) If the court finds that the defendant has a firearm in or subject to  
20 his or her immediate possession or control, the court must  
21 consider whether bail, as set, or defendant’s release on own  
22 recognizance is appropriate.

23 (B) If the defendant does not appear at the hearing and the court  
24 orders that bail be revoked, the court should issue a bench  
25 warrant.

26  
27 (2) If the criminal protective order is issued as a condition of probation  
28 under Penal Code section 1203.097, and the court finds at the review  
29 hearing that the defendant has a firearm in or subject to his or her  
30 immediate possession or control, the court must proceed under Penal  
31 Code section 1203.097(a)(12).

32  
33 (3) In any review hearing to determine whether a defendant has complied  
34 with the requirement to relinquish firearms as specified in Code of  
35 Civil Procedure section 527.9, the burden of proof is on the  
36 prosecution.

37  
38 **Advisory Committee Comment**

39  
40 When issuing a criminal protective order under Penal Code section 136.2 or 1203.097(a)(2), the  
41 court is required to order a defendant “to relinquish any firearm in that person’s immediate  
42 possession or control, or subject to that person’s immediate possession or control . . .” (Code  
43 Civ. Proc., § 527.9(b).) Mandatory Judicial Council form CR-160, *Criminal Protective Order—*  
44 *Domestic Violence*, includes a mandatory order in bold type that the defendant “must surrender to

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 (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
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>

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<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 5<sup>th</sup> 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 5<sup>th</sup> 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 (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<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 5<sup>th</sup> 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.

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			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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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<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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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<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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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<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>

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
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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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
	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

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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	

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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

**JUDICIAL COUNCIL MEETING**  
**April 23, 2010, Meeting**  
**San Francisco, California**

The Judicial Council of California is the constitutionally created policymaking body of the California courts. The council meets at least six times a year for business meetings that are open to the public and audiocast live via the California Courts Web site. What follows is a polished and unedited transcript of a portion of the meeting of April 23, 2010. The official record of each meeting, the meeting minutes, are usually approved by the council at the next business meeting.

**Item H        Domestic Violence: Firearms Relinquishment in Criminal Protective Order Cases**

**Chief Justice George:** All right, please be seated, and we're going to resume our meeting now. We are going to proceed with the next agenda item, H, domestic violence firearms relinquishment and we are conferring with the schedule since we're behind and some have time constraints. Justice Huffman, do you have a recommendation in terms of the agenda in that regard?

**Justice Huffman:** Yes, Chief, I have referred with the members and the commission on impartial courts deserves full discussion in public and there's not enough discussion to do the other matters and give that commission report the attention it needs, so we recommend that that be put over to the next business meeting.

**Chief Justice George:** All right. We will do so. We regret the inconvenience to those presenters, and I know that especially Justice Miller has come from a distance, and we will take it up at our next meeting. But it's better doing that than being rushed, as I understand that some of the presenters could not be here, and we're losing council members as well, a couple of whom have told me they have to head back. So we would not be able to have them participate in the important recommendations to be made by this commission.

We will proceed now with the domestic violence matter, item H, and here, too, we actually had some task force members who could not attend, and we may have lost some, too, with the delay in our schedule, which was certainly merited, but we will proceed now with the chair of the Domestic Violence Practice and Procedure Task Force, Justice Larry Kay, and I believe we also have Judge Carol Overton of the Santa Clara Superior Court and assisted by Chris Cleary [phonetic] as well. Larry?

**Justice Kay:** Thank you, Chief Justice George and council members, for allowing me to present to you the Domestic Violence Practice and Procedure Task Force's proposed rule 4.700 on firearms relinquishment in criminal domestic violence cases. This rule has benefited greatly from a lengthy deliberative process that incorporated suggestions from formal commentators, members of the public who testified at our hearings in the issues, and from members of the council's internal committees who reviewed the rule. The Criminal Law Advisory Committee has voted twice to support it. The resulting rule is a narrowly tailored procedure, we think, to implement the requirements of the underlying statutes while ensuring

the court has the ability to meet its responsibilities of both safeguarding the rights of the accused and protecting the victim and ensuring public safety.

The California Attorney General's Report on Victim Safety and Batterer Accountability was released in June 2005 and was harshly critical of the follow-through in enforcement of court orders meant to protect victims, their children, and other members of the public. Upon release of their report, Attorney General Bill Lockyer superficially stated, system fatigue is not an excuse for domestic abuse. That report was the impetus for Chief Justice George's appointment of the Domestic Violence Practice and Procedure Task Force in September of 2005, which was charged with improving court practice and procedure in cases involving domestic violence allegations.

In carrying out our charge, we realized the need to improve court inquiry and review procedures that apply to defendant firearm ownership mandatory relinquishment by defendants who are subject to criminal protective orders. Code of Civil Procedure Section 527.9 and Penal Code Section 136.2, each require increased scrutiny by the court in domestic violence cases, but neither provides a procedure to follow up on mandatory firearms relinquishment required by the statute whenever a criminal protective order is issued.

When the court issues a criminal protective order in a domestic violence case, it is required that the defendant relinquish within 24 hours any firearms in his possession or control. What happens after the court enters an order to relinquish firearms? Too frequently, we have found, after the court makes the order, nothing happens. The statutes simply do not provide a procedure for follow-through on the enforcement.

This gaping hole is a significant threat to public safety.

Let me explain. Multiple studies have found that intimate partners are more likely to be murdered with a firearm by all other means combined. The mere presence of a firearm makes it six more times that a batterer will commit lethal abuse. Women who have been previously threatened or assaulted with a firearm or other weapon are 20 times more likely than others to be murdered by their abusers.

According to a University of California at Los Angeles study, when a firearm is kept in a home, with an abuser, nearly two-thirds of the victims report that it is used by the abuser, either to scare, threaten, or harm them. The severe risk that domestic violence offenders pose to their victims is illustrated by statistics concluding that more than 1 in 10 homicide victims in this country were killed by an intimate partner.

Over 30% and perhaps as many as 40 to 50% of female murder victims are killed by intimate partners, most of whom are killed with firearms. The involvement of a gun during an incident of domestic violence significantly increases the probability, making it 12 times more likely, that the encounter will result in homicide. In 2005, guns resulted in the deaths of 678 women in this country who were shot and killed by intimate partners.

And of course, we all know this kind of violence at home is not limited in its effect to the intimate partners involved. It is estimated between 3.3 million and 10 million children witness domestic violence annually. Research demonstrates that exposure to violence can

have serious negative long-term effects on children's development. The proposed rule before you provides a procedure to help ensure that the court's orders are enforced and makes it more likely that prohibited firearms will be relinquished. I believe this rule will save lives.

In a nutshell, this is how the rule will work. When a court issues a criminal protective order, it will determine based on the information before it whether there is good cause to believe that the defendant has a firearm. If the court in a particular case does not -- does have good cause to believe the defendant has a firearm, the court will set a review hearing in two court days for the purpose of determining whether the defendant has relinquished his or her firearm.

Good cause to believe may come from a number of sources.

For example, the district attorney is presently required by penal code section 273.75, whenever a criminal protective order is issued, to provide to the court the defendant's history, including prior convictions for domestic violence and other forms of violence or weapons offenses along with any current restraining order issued by any civil or criminal court or the victim may make a statement or may have made a statement to law enforcement that the defendant has a firearm. A defendant may have registered guns on file with A.F.S., the automated firearm system.

At the review hearing, the prosecution will have the burden of proving the defendant is in possession or control of a firearm and has failed to relinquish it. If the court believes the defendant is in possession of a prohibited firearm after the review hearing, the court will revoke bail if the protective order was issued under Penal Code Section 136.2. And if the defendant is on probation, set a hearing to determine whether the defendant is in violation of a term of that probation, if the protective order was issued under Penal Code Section 1203.097.

It is important to note that the proposed rule is a tool to be invoked only where needed. If the court has no information before it that gives it good cause to believe the defendant has a firearm, the rule will not apply. And the court will not set a review hearing. The proposed rule would call for a review hearing only in a case where the court finds good cause to believe the defendant has a firearm in his or her immediate possession or control. Precisely the kind of case that poses a serious risk of gun violence against the protected person. It is our understanding from courts who have implemented local procedures similar to the proposed rule that it is rare that the review hearing would take more than a very short time or there would be very many actual review hearings, and the existence of such local procedures has shown that by itself, it results in relinquishment of firearms.

Judge Finley in San Diego followed a procedure similar to that for many years. She reports it has had virtually no impact on her court in terms of congestion. She says it involves approximately 1 to 2 extra hearings a month.

Judge Katherine Feinstein in San Francisco, formerly a member of this task force, spoke to judges in her court who concluded that implementation of the rule would not adversely affect the court's work load in San Francisco. In fact, they would welcome it.

Judge White from Ventura presided over a criminal domestic violence calendar five days a week for over a year using a procedure similar to that in the proposed rule. She indicated the hearing seldom takes more than two or three minutes while she puts evidence on the record.

Commissioner Jane Shade from Orange County uses a very similar procedure to that in the proposed rule. If the defendant fails to file a form stating that either he or she does not possess a firearm or has relinquished it, then the court, if it has reason to believe there is a firearm based on information provided to it, sets a hearing. In her experience in the last two years, only two hearings have actually had to take place.

And finally, Judge Carol Overton from Santa Clara on my right, will address you shortly and used a similar procedure in her court for more than a year without problems and with very little need to schedule formal compliance hearings.

I hope you will all agree it is important for all of us in considering this rule to weigh minor inconveniences that may arise when the statutory requirements of gun relinquishment are consistently followed statewide against a very serious public safety concern posed by cases where there are allegations of domestic violence and good cause to believe that a defendant has a prohibited firearm. I would ask you, as you consider this rule, to remember that in domestic violence cases, the court is already charged by statutes with a unique role, an affirmative duty to take steps to assure the safety of victims and witnesses. The procedure proposed today in this rule we believe will greatly aid the court in performing that duty. I want to assure you that this rule is being proposed by task force judges who have worked in the domestic violence criminal and civil courts and who know what it's like in D.V. trenches. These judges would not be inclined to propose a rule that creates extra work for judges that is not greatly outweighed by the increase to public safety. Indeed, the contrary is true and is borne out in the experience of those courts who have worked with the rule.

I believe your adoption of this rule would help us fulfill our existing responsibilities towards public safety in domestic violence cases and will increase the public's trust and confidence in the integrity of court orders.

Thank you, again, for this opportunity to address the council. I would like now to introduce Judge Carol Overton from Santa Clara County, who will briefly share her experiences with a local procedure very similar to the rule before you.

**Judge Overton:** Thank you, Justice Kay. I want to say thank you to Chief Justice George and members of the council for this opportunity. As Justice Kay has suggested, I've been invited here today because I do have practical experience with a similar rule I implemented in Santa Clara County at the beginning of 2009. I'm aware of the rule and its current iteration. I've been aware of the various modifications of the rule before the council today as it has been revised in response to various concerns that have been voiced.

By way of background, I had two years in a dedicated domestic violence department, 2008 and 2009, handling the full array of domestic violence criminal cases and at the beginning of calendar year 2009 I took over the role of supervising judge, took over the role of supervising judge over three dedicated domestic violence departments. In that capacity, among other calendars, I handled the daily arraignment calendars, in and out of custody, and that's when

these arise. So in virtually each one of these cases I would have to make a decision whether to issue a criminal protective order, whether it be a peaceful contact order or a no-contact order, and as we are all aware, the firearm component of these orders is a very critical component that the court is required to grapple with.

So the reasons that I implemented a rule similar to the one that is before the council today is because I had a concern that if the court has information, reliable information suggesting that a domestic violence defendant has a firearm, I felt that judges would be remiss in not following through to ensure that the mandates of the statute are met and that that firearm is relinquished. And in the words of an editorial comment that was made in a separate jurisdiction, and I quote, because I can't take credit for this quote, ordering a potentially violent person to get rid of guns without any kind of accountability is pointless. Now, in implementing this rule, I was also concerned about the crush of the domestic violence calendars. They're unrelenting. They're every day. They're morning. They're afternoon. They're high volume. We don't get a break throughout the week or throughout the day. I didn't want to add to that congestion that is already there by virtue of the volume of the cases and quite frankly by virtue of the fact that we have to spend the time that's necessary to deal with the criminal protective issues. But much to my surprise and pleasure, I found out that implementing this additional rule of oversight was very de minimis in terms of the impact it had on the court.

So essentially let me tell you what we did in Santa Clara County. If we had information to suggest there was a firearm, I would set a hearing 48 hours hence. And I came to call those hearings compliance hearings, because in most instances we had information on the front end, at the time of arraignment, that the defendant had a registered firearm, so the firearm issue was not really a contested issue. And then it was just a matter of making sure that firearm was relinquished within the statutory time period. Because we were in a situation where our district attorney and public defender did not appear at arraignment, that's changed very recently, but for the full year that I was supervising the domestic violence departments, we did not have either a D.A. or a public defender at arraignment, I would set that compliance hearing on a day when I knew that the public defender and D.A. would be there and my clerk would notify their offices to make sure they were aware of the cases on the calendar. And of course, one of the things this rule does is allows the court to give the parties some additional time if additional time is needed to work out the details of the firearm relinquishment process.

Now, were there occasions where we would have some evidence suggesting that there might be a firearm and that evidence was not really definitive? Yes. And then it was a matter of setting it for a hearing. But because we were engaging the public defender and the district attorney, when we came back, we had a better handle on the situation. In one case the district attorney says the victim said it wasn't a firearm, it was a glass case, and they requested the hearing be taken off calendar. So I just feel that the impact on the court calendar is going to be de minimis.

Now, in terms of the court process in Santa Clara County, they would give us information at arraignment about whether or not the defendant had a registered firearm. But one thing I found in implementing this process was that we were not getting all of the statutorily required information that we needed from the district attorney. We were capturing information about registered firearms, but we needed information about all firearms.

By this time, the rule that is before the council today was well underway in terms of the process. And so I spoke to the supervising domestic violence deputy district attorney and I said, look, since you're not appearing at arraignment, and I hopefully put it across in a diplomatic way, but basically I got the information across that the district attorney has a responsibility under Penal Code Section 273.75 to furnish the information to the court that we need to make an informed decision about firearms. We as judges don't have an investigative function, but the district attorney does. As a result of that collaboration and cooperation where both of the district attorney and public defender were engaged and involved, we have a process where the district attorney provides a firearm sheet to the court at the time of arraignment which indicates whether there are registered firearms and whether there is evidence of any firearms apart from the information about registered firearms. So essentially now we are getting the information we need and able to minimize the number of hearings that need to get set and we're not putting ourselves in a position of being, quote, investigators.

Now, I understand that the resources and culture does vary from court to court, from jurisdiction to jurisdiction. Excuse me. But my experience has been that we have received information about more firearms than we ever contemplated there were out there.

By way of explanation, I had one case where I set a hearing, the public defender came back with a grid, we thought there were two firearms, he came back with a grid itemizing 14 firearms which were appropriately relinquished. Is that going to happen in every case in every jurisdiction? No. But the fact is we're going to be capturing more firearms in this way and enhancing the public safety, and for me, and for most, if not all judges, that is the critical issue. That is the issue that is paramount. I would be more than happy to answer any questions that council members have about the logistics about the practicality of the rule, but I'm sensing that the council certainly has a good understanding of some of the practical mechanics of the rule, so I will save any additional comments for answering questions, if any. I want to thank you for giving me the opportunity to say a few words here and I would ask to indulge the council with just one other example of the importance of this rule. I did have one situation where there was an allegation where the defendant pointed a loaded firearm at his wife's chest and threatened her life. At the time that that happened there were two children present in the house. He was subject to a no-contact order that I issued, and he was directed to relinquish his firearms in the appropriate manner. I set the matter for a compliance hearing, at which point I learned that he had sold the firearm in question to the victim. And now the victim was storing that firearm in a safe that was jointly accessible by he and his wife in the house, that he was not supposed to be at at this time, because of the no-contact order. He was remanded and his bail was raised, but the reason for it was that he had a no-contact order and he actually contacted the victim, so that he could work out the mechanics of the sale of the firearm. But one of the reasons that I use that example is because I think it serves as a good example of what can happen in a situation where we don't have the additional level of oversight that this rule addresses. And, of course, for me, and I'm sure all others present today, the public safety and avoiding a lethal situation for domestic violence victims is paramount. Thank you very much.

**Chief Justice George:** Thank you both, and I would call on Judge Yew first because she has some time restraints.

**Judge Yew:** Thank you very much. I would like to thank Justice Kay and the task force. I thought you did good work and were so flexible and I think the rule has benefited from the permutations it's gone through. I remember when Justice Kay was on a conference call and could barely speak but still talked to the RUPRO committee.

**Justice Kay:** You're very welcome.

**Judge Yew:** And others served in the criminal domestic violence division, and had the opportunity to supervise that division along with, you know, Judge Overton and Judge Chapman who have had this experience, and all of us support this proposed rule. The reason was eloquently stated by Judge Overton, and I know that we're sitting on RUPRO together, that Judge David Wesley has some concerns, and I'm at a bit of a disadvantage because he hasn't had an opportunity to address them.

But what I would like to say to people who have a concern about this proposed rule is that this task force was working at the direction of the council. The council asked the task force to put together some proposal that would allow a uniform mechanism for relinquishment of the firearms and tracking that, not only because of public safety, but when you're talking about issues of domestic violence, accountability is critical. That's part of the crime and the cycle of violence when the perpetrator doesn't have accountability.

I think this is a narrowly tailored rule and it's the best possible rule that could be devised given that there's some slippage with the term "good cause to believe," but that wasn't created by the task force, its language directly in the statute. So this is definitely, I think, the best proposed rule that -- and it benefited from all the various permutations. It's certainly better than having no uniform procedure or having no procedure whatsoever, which is definitely the case in some jurisdictions, and has led to some examples that Judge Overton has spoken about.

So I'd like to thank Judge Wesley for the time, and thank you so much, Chief, for calling on me first.

**Chief Justice George:** Well, Judge Wesley, your concerns having been previewed, we'll hear from you next.

**Judge Wesley:** Chief, Miriam Krinsky has to leave, and I told her I would wait.

**Chief Justice George:** Alright

**Ms. Krinsky:** Thank you, Judge Wesley, and thank you, Chief. And I actually have a cab waiting for me so I apologize for talking and running. It's not the electrician, it's the airplane that awaits me. I also appreciate the tremendous work of the task force and the efforts made to address concerns and questions that I had that others had on RUPRO. I spent 15 years as a prosecutor, and one victim dying at the hands of somebody who shouldn't have a firearm in their possession is too many. Nearly 700 is truly tragic.

So I think the aim of protecting victims and keeping guns out of the hands of those who shouldn't have them is a laudable one and a critically important one. My problem is, I'm just not sure that the rule achieves that aim in the best way or, frankly, in the way that will best

protect victims. And let me just briefly say why. And I know that Judge Wesley will be talking at some length about his concerns as well.

One of the groups that commented on the rule said they had a concern this would cause a false sense of security, and that troubles me as well. I think all of us embrace the view that there needs to be follow up and there needs to be accountability. But my question is, by whom and how. And I think that follow up and accountability needs to be done by an enforcement arm, which would be probation officers, law enforcement, or others, who are charged, naturally, with enforcing court orders.

So it troubles me to put the court, in essence, into a quasi enforcement position. If there is reason to believe that an individual has not complied with this Court order or any other critically important court order that can be brought to the Court's attention without a vehicle like this, and there are ample opportunities for revocation of bail, for probation violations, or for other hearings to bring about compliance with a court order. But it seems to me that creating an inflexible structure that I worry could cause an added workload on the court, if victims were protected as a result of that, why view would be, bring on that workload. But it worries me that this isn't going to save the people's lives that it puts the court on a hot seat that is occupied by law enforcement and whose job it is to keep the victims safe.

So I see other vehicles. I don't think the absence of a rule precludes the good work that's going on in Santa Clara from continuing, but I think every community is going to need to sit down with law enforcement and probation officers to discuss this issue and figure out the best course to protect their victims. So I am troubled by the rule, notwithstanding the terrific efforts the task force has made and others have made, and again, sorry to have to run.

**Chief Justice George:** Let's hear from you, Judge Wesley, and that may give an opportunity to Judge Yew to respond.

**Judge Wesley:** I love to listen to the other council members speak. I too want to compliment the task force on its hard work and its successful implementation of many improvements in the handling of domestic violence cases throughout the state and also bringing to light the danger of firearms and the goal to remove those handguns from the parties in domestic violence cases. And while I oppose this rule as unnecessary, I support the goal of removing handguns from the litigants, both litigants, in domestic violence cases.

I was on the Criminal Law Advisory Committee when they considered this rule the first time. I was on RUPRO when we sent the law back to the Criminal Law Advisory Committee and on RUPRO when we sent it forward to the Judicial Council, so I have talked to many people about this rule.

And I think the best way I can underscore my opposition is to give you three scenarios I see and explain why the rule is not necessary. First, if the defendant is on probation. If the defendant is on probation, I don't understand why we need this rule. As a condition of probation, we say the defendant should not have possession of a firearm. I rely on probation to determine whether they have relinquishment or not relinquished the firearm. If they believe they have not, they can file a notice of probation violation. If I find the defendant is in

violation of his probation, I can incarcerate him. So there is a remedy in the system for anybody on probation to do that. I don't need a rule to tell me how to do that.

If the defendant is arrested for domestic violence, and the scenario that I heard from you, Judge Overton, was that the assailant was arrested after having pointed a gun at the victim. If he points a gun at the victim, my guess it's going to be a 273.5 domestic violence charge with a gun allegation, either armed or in use. In that case you issue the protective order, order him to turn in the gun within 24 hours, and you set this for this hearing that the rule requires and his public defender comes in and says, we're not going to admit an enhancement allegation in this case, and we're not going to respond, Judge. And you can't really raise the bail because when you set the bail, you had the gun charge and you assumed that he had a gun and that it was true for purposes of setting the bail. So on what basis, Judge, are you going to raise the bail? There aren't any grounds to raise the bail in this case. And you can't raise it because he didn't turn in the gun that he has never admitted he had, because the lawyer is not going to allow him to admit that.

The third scenario is the defendant is arrested, the wife or significant other says he has a gun, the protective order is issued, bail is set as if he has a gun, and you set it for a hearing to show proof that he's turned in a gun that he says he's never had. And again, if he's represented by counsel, his lawyer is not going to provide that proof. In addition, the rule requires that the defendant appear. The rule requires that under -- and says that you can do that under 977.82 in a misdemeanor case. I don't know that you can do that under 977.82 --

**Justice Kay:** It no longer requires that.

**Judge Wesley:** All right. You took that out.

**Justice Kay:** We said may.

**Judge Wesley:** You said "may" to present his side of the case. You can't require them to appear under 977 because you've explained the protective order at the time you issued it. We estimate in Los Angeles in talking to our Justice partners there would be 7,000 hearings. If the defendant decides to bring in the victim for the purposes of proving the gun hasn't been turned in, my guess is that any competent defense lawyer is going to use that as an opportunity for discovery and will ask a lot of questions of that domestic partner and create some discovery for himself and that hearing will not be two minutes. In fact, I can anticipate that hearing being quite a bit longer. If courts around the state are already finding ways to remove those guns and being creative in the ways they do that, I think education by this committee is sufficient without a rule, to best practices being used in San Diego, San Francisco, Orange County, Santa Clara, wherever people are using those best practices, I think the rule is unnecessary, I think it places the burden of enforcement on the court where that burden belongs with the prosecutor, probation officer or law enforcement. We don't have the tools they have to ensure compliance. And although this is a good attempt, it has many flaws that I'm not even mentioning at this time that have been pointed out to me by other participants. So I would indicate my opposition to it for those reasons. I just think, and if there are only two hearings held in a year, if that's true, then it's an unnecessary rule. So that's my feelings.

**Chief Justice George:** All right. Thank you. Would you like to go ahead?

**Judge Wesley:** No, thank you.

**Chief Justice George:** What we'll do is give you that opportunity before you actually –

**Judge Yew:** Thank you so much.

**Chief Justice George:** Which I understand is around 1:30, is that correct?

**Judge Yew:** Yes.

**Judge Murray:** I, too, would like to thank the task force for all of your patience with RUPRO. The council members should know that we really did put the task force through the ringer with this one. We sent it back to the advisory committee once and didn't approve it, and they worked very hard with us and made some changes that in my view really did improve the rule as a whole.

The difficult thing for me is that distinction between a rule with a good purpose and a good rule. And I think there is a distinction. The difficulty with this rule is basically in my mind, twofold. One is, it's rather extraordinary in how it involves the court in a process that normally is thought of as a prosecutorial process. It involves the court in actually setting the matter for hearing and to taking actions to enforce the firearm relinquishment order.

The prosecution is state funded, has the resources of law enforcement, in this case, it's a crime to possess a firearm after you've been subject to a protective order. It's a violation of the court order that they can prosecute, and since January 1st, they have the ability to secure a search warrant based on probable cause if they believe they have probable cause to believe that the person has a firearm. Basically meaning they can go out and get it. Those, that's the appropriate role for the prosecution. Having the court involved in that process really does raise some issues of perception as to the Court's appropriate role.

I don't know how many times I've been in a courtroom and seen inept prosecutors prosecuting a case and there was always this strong urge to come in and assist, but that's not something that we do. I noted in the materials that it indicates, failure to enforce relinquishment order could threaten public safety. Clearly, that is true. What clearly could threaten public safety is if the person isn't convicted of the crime with which they're charged, but we understand it's not our role to assist in that conviction. When you read the rule, although we call it a relinquishment rule, the bottom line is the only power we have is to increase bail.

That's it. If the rule is -- if the order's been violated, the Court can consider that in increasing bail.

The judge's point was well-taken. If you have that kind of crime and if you had an indication the defendant had a firearm, you've already considered that when you set bail in the first place. If that is our remedy, we don't need this rule. If we have good cause to believe a defendant has a firearm in his possession, we can have a bail hearing.

We don't need the structure of this rule, the limitations of this rule, and we don't need the conflict of perception that it leads to by having the court embroiled in enforcing the rule. It follows the traditional method. The prosecution has the burden of proof. Therefore, if you have a hearing, the prosecution has to be prepared at that hearing to enforce the order, and if the prosecutor is prepared to enforce that order, let the prosecutor initiate the hearing in the first place.

I appreciate the purpose of the rule. I appreciate the passion with which it's regarded, but I think it would lead to a false promise that we are going to protect people that we really are not in a position to protect.

**Justice Cantil-Sakauye:** Now you understand why RUPRO is neutral on this issue. I feel compelled to speak because about 13 years ago I ran the first domestic violence court in our county, with misdemeanor. It was a chaotic long-term never-ending day-after-day court, and I ran it for a number of years in part because of my interest and in part because no one else on the court would take it, and I didn't want to see the court go away because it served such a useful purpose, at least in terms of the families that came before the court.

Now, Judge Overton has described 13 years hence there's a rule or there are -- some courts are fashioning their own rules. I remember fashioning my own rule and trying to pursue these guns and not having much guidance on how to do that but getting compliance nevertheless. When you have the defendant in court and you're at the early part of the case where it's an arraignment and the victim is still of the mind to prosecute, he's pretty compliant. So we made these rules up, and it didn't involve extra work, but it was worth it, it was worth the effort of trying to pursue the guns that might have existed out there. Then in 2005, it's really important for me, and it was mentioned by Justice Kay, that the Attorney General issued a very thick report that was critical, highly critical of the court not doing its job in following up on a number of occasions with domestic violence victims.

And one of the -- to me the highlights of that report was how critical the A.G.'s report was of the court not following up on pursuit of these guns and taking them away. So after five years of work and many, many, many meetings and much public input, I remember I was on the task force in the early years, Five years later now this rule comes to the council. And we know that throughout the state, certain courts have their own rule, there's a various number of iterations of those rules.

And for me the question is not whether we should have a rule or not because I think that's unacceptable. Courts are doing this on their own. And this is a rule that, granted, is imperfect. A domestic violence court is imperfect. The court manages the best it can with the resources it has so it can follow up so the orders are complied with. To me that is a compliance issue.

It only comes in front of the judge if there's good cause to believe that a gun is present. And to me, courts will have to determine what the good cause is but when it comes to ordering compliance with your own order, at least in Sacramento County, probation can be of no help, it has no funds, it's being gutted. Law enforcement is being gutted, there can be no help for that. Even the D.A.'s office is looking to cut positions. There is no help in that regard.

This is a court compliance issue for me. It is a rule that is imperfect, I certainly acknowledge the issues and criticisms that have come along but it's a tool in the arsenal for domestic violence court judges and I would support this court -- this council recommending -- adopting the rule.

**Justice Huffman:** Just briefly. It's an emotional issue, and it's hard to say anything against a rule that says take guns away from domestic violence perpetrators, it's almost like are you against motherhood? And I sincerely support the judges dedicated to this area. But I think there's a difference between a practice, a good idea and the Judicial Council casting a rule that -- as I think it's been articulately explained shifts the enforcement from the prosecutor, the executive branch, to the neutral judicial branch who have already other tools legitimately used, such as bail.

And there's a legitimate concern in my mind if you've set bail, based upon these items, and then you're going to have a hearing to increase the bail, the same item in which you set bail in the first place, I'm not sure how comfortable I am with that. And I'm not terribly comfortable with the notion that the judge is the enforcer.

So I'm opposed to the rule because I think the practice is important, the concept is important, but I don't think it's the place for the Judicial Council to write this as a rule of court that all courts must follow. And I think for the reasons stated it is not an appropriate criminal law division of responsibility.

**Chief Justice George:** Back to you.

**Judge Yew:** Thank you, Chief. So I don't really see that this proposed rule is putting the court in the position of enforcer. As Justice Kay said, we are in a unique position by statute to oversee domestic violence cases. For example, we have compliance hearings regularly per 1203.097 to make sure that perpetrators attend their batterer's intervention program. If they don't, we're not there enforcing the violation of probation. We set it for a hearing.

The person who is accused is represented, and the District Attorney is there to show that this person hasn't complied with the requirement that they do a 52-week program. So in my mind, this is similar. That the court is just setting the hearing. It is not enforcing this, you know, being the -- taking on -- prosecution arm.

With respect to bail, we have a similar situation where people are charged with being under the influence. We set bail when they're charged, we take that into consideration. Then if we set bail, many of us will require them to submit to drug testing as a part of their release. If they fail to test or test dirty, that is a new circumstance that we take into consideration if we decide to remand them or take another look at bail.

Here we're required by statute to order that they relinquish their firearm and we set a hearing date. If we have good cause to believe, we set the hearing date. If we find they haven't relinquished the firearm, that's another new circumstance much like the fact that they've continued to test dirty.

So it's not -- I don't really -- I don't really -- well, Judge Wesley's example doesn't resonate with me. Maybe it is what the Justice said. If you're in the thick of it, you realize that you need to have some rule and it should be uniform.

I think all of us in the trial courts see that our county boundaries are very porous. I have families in dependency court constantly moving from county to county. When I was in criminal domestic violence court, people were constantly moving from county to county. If the rules aren't uniform, the dangerous weapons will slip through the cracks.

**Justice Kay:** Can I just insert something here? I just have to say that Judge Wesley's example of a charge with firearm use is probably not going to be a misdemeanor, and it's the exceptional case. This rule is not aimed at establishing the truth of firearm use. This -- this rule is intended to get to those cases where you're not sure, but you think there might be a firearm involved or owned by the perpetrator.

And there's no firearm use, but -- 273.75 already says that the D.A. has to prepare a report and, quote, the information shall be presented for consideration by the court. What for? Also, I'd like -- Carol wants to respond also, Judge Overton.

**Judge Overton:** One of the fine points that may have been lost, and I apologize, in the description of the one situation involving the firearm being held to the victim's chest was the fact that I raised the bail in that case and remanded the gentlemen because he was violating the no contact provisions of the no contact order. So the remand was because of the improper contact that he had with the victim in the case. But the reason that I use that example is because it really underscores the problems that we can have if we do not set these compliance hearings and if we don't have a cogent and uniform Rule such as the one that is before the council for consideration. I agree very much with the comments that were made by Justice Cantil that these aren't just compliance hearings. One of the boons of the hearings is we can go back to the District Attorneys' offices in our jurisdictions and say it's your responsibility by statute to provide this information to us.

I agree with Judge Murray when he says that the court should act only upon information brought to us by the District Attorney. In no way should we be embroiled in the process. We are acting upon information that we have that's presented to us by the District attorney. If the information is not presented, we cannot act on it. If the defendant is refusing to talk to us, we cannot compel him or her to talk to us. We are going to be mindful and respectful of the Fifth Amendment privilege just as we are in numerous other contexts that arise throughout the criminal process.

What I would say, since I have a brief opportunity to make a final remark, I still believe that we as judges would be hard-pressed to justify inaction, a failure to follow through with oversight in a situation where we have reliable evidence and information that a defendant has a firearm. Judge Yew stated it very clearly that this is very normal in the realm of domestic violence. It's not like a drunk driving case or the myriad of other criminal cases that we have because we have a number of statutes that require affirmative oversight. And I believe this is one of them. Thank you.

**Chief Justice George:** Called on Justice Baxter

**Justice Baxter:** Just a point of clarification. As I understand it, the rule applies when the judge acquires knowledge.

**Justice Kay:** Right.

**Justice Baxter:** What happens in a situation -- and I assume that that's the specific judge that had issued the order who's in that particular defendant.

**Justice Kay:** Correct.

**Justice Baxter:** I guess the concern I would have just in terms of a practical application of that is what happens where let's say the -- the defendant gets involved in some other altercation involving a firearm, that certain members of the court become aware of and the judge that issued the order -- where you have a rule with oversight, how would the rule work in that instance? Or let's say an arrest is made in an adjoining county. Especially in a county the size of Los Angeles, the specific judge that's in charge of this who has this obligation of oversight doesn't acquire the information, maybe because he or she doesn't read the newspaper. Is that judge going to be subjected to criticism for not connecting the dots? How does the rule work there?

**Justice Kay:** Well, Justice Baxter, what is intended by the rule is the judge before whom the person is appearing at arraignment. The use of the word "court" is always generically used in our rules and this is something we discussed. I think the answer to it, 273.75 makes it an affirmative duty of the District Attorney or the City Attorney prosecuting the case to bring those matters to the attention of that judge. And if not, then the information simply isn't available.

Hopefully soon, with the advent of the [California Courts] Protective Order Registry, that will become something that is readily available to all judges, to look at existing protective orders in existing cases not only from the jurisdiction involved but on a statewide basis. But that is the answer to that question.

**Chief Justice George:** All right. Yes?

**Commissioner Hurwitz:** To follow up on Justice Baxter's question, what happens when, as so often occurs the victim is not present during an arraignment and comes to me as a family law dedicated domestic violence judicial officer and gets a temporary restraining order with the same firearm relinquishment requirements in it and requires me to identify in a check box on the form that the alleged perpetrator may have a firearm? And if that victim who has not been in the criminal court arraignment says to me he has a gun, and I identify that on the temporary restraining order, am I now going to have a duty to ferret out who the arraignment judge is going to be and advise that judge that we have been told that that defendant has a firearm and then will that judge be required to set a hearing based on my determination that there may be a firearm?

**Judge Overton:** I welcome the opportunity to respond to that question. Of course this is a very important issue and one that, as Justice Kay said, we had contemplated and discussed. And one of the things I want to point out, again, is the statute 273.75 Penal Code which among other things expressly makes it the District Attorney's obligation to bring to the

court's attention any other protective orders that are in effect. So it's very fortunate that the statute deals with that in such a direct fashion and makes it the District Attorney's obligation to bring that type of information to the court's attention.

Yes, it's true that there may be situations where the judge sitting in the criminal court is unaware of the particulars of another order. And I think that probably varies from jurisdiction to jurisdiction. In our jurisdiction, at the time of arraignment we have information indicating whether there's an emergency protective order in place. When that emergency protective order expires. Whether that civil court order has been issued out of the family court or otherwise; the nature of that order and the expiration date of that order.

So hopefully other jurisdictions have that type of coordination between the divisions of their court. If they don't, then most likely they would want to shore that up. And I think we're all waiting for the time when we do have a uniform coordinated system. But I share Justice Kay's view that we are acting only upon information that is in front of us. And beyond that, only information furnished to us by the District attorney. And that is per statute.

And that also goes to the concerns that have been raised about the court putting itself in an investigative role. And most assuredly we would not be doing that. We would not be endeavoring to do that, we would merely be acting responsively and pursuant to the mandate and guidance that the statute gives us with respect to following up and overseeing the relinquishment of firearms. Because without this rule, and a uniform rule, we'll have situations where defendants have firearms that are not relinquished.

The oversight role permeates the domestic violence statutory scheme. And this rule is embedded in that statutory scheme that requires overall accountability and oversight.

**Justice Kay:** Just in closing, I just want to say one thing, and then it's in your hands. I think we really should try to get the guns, and if you look at 136.2, even though some of the -- the rule may not be perfect, and some of these cases are going to slip through, the court, on its own motion shall consider issuing a protective order upon good cause belief. There is no other area in the law to my knowledge that requires this degree of scrutiny by the court. For this we have been criticized in not following through.

**Chief Justice George:** Any other individuals wishing to share their thoughts on this? We need a motion.

**Judge Yew:** I move that we adopt the proposal that is before us.

**Mr. Capozzi:** I would second that.

**Chief Justice George:** Any further discussion? All in favor. I think this calls for a head count. Bill?

**Mr. Vickrey:** Judge Abdallah

**Judge Abdallah:** Aye.

**Mr. Vickrey:** Justice Baxter.

**Justice Baxter:** No.

**Mr. Vickrey:** Justice Cantil-Sakauye.

**Justice Cantil-Sakauye:** Aye.

**Mr. Vickrey:** Mr. Capozzi.

**Mr. Capozzi:** Aye.

**Mr. Vickrey:** Judge Edmon.

**Judge Edmon:** No.

**Mr. Vickrey:** Justice Hill.

**Justice Hill:** Aye.

**Mr. Vickrey:** Justice Huffman.

**Justice Huffman:** No.

**Mr. Vickrey:** Judge Murray.

**Judge Murray:** No.

**Mr. Vickrey:** Mr. Penrod.

**Mr. Penrod:** Yes, aye.

**Mr. Vickrey:** Judge Smith.

**Judge Smith:** Aye.

**Mr. Vickrey:** Judge So.

**Judge So:** Aye.

**Mr. Vickrey:** Judge Wesley.

**Judge Wesley:** No.

**Mr. Vickrey:** Judge Yew

**Judge Yew:** Aye.

**Mr. Vickrey:** passes 8-5.

**Chief Justice George:** All right. I want to thank the members of the presenting panel as well as your task force, and Justice Kay, somebody who's in retirement so to speak, as I told Judge Friedman during the break, it's like the Hotel California, you can check out, but you can't quite leave. Justice Friedman was going to sing a few bars. Thank you very much. I respect everybody's views on this.

**Mr. Vickrey:** Members of the panel, in light of the discussion, it might be appropriate to ask the AOC to conduct an evaluation of the impact of the implementation of this rule and then to bring this information back to you at some point.

**Chief Justice George:** You want to make that motion?

**Judge Yew:** Yes, I'd be happy to make that motion.

**Mr. Capozzi:** I second that.

**Chief Justice George:** All in favor. Opposed? Thank you.

# JUDICIAL COUNCIL

ROLL CALL VOTE  
*Domestic Violence: Firearms Relinquishment in Criminal Protective Order Case*

Subject Item H Date 4-23-10 Tab # \_\_\_\_\_  
 E&P

#	NAME	VOTE <sup>1</sup>		
		YES	NO	ABSTAIN
1.	Hon. Ronald M. George, Chair			<i>Present</i>
2.	Hon. George J. Abdallah, Jr.	✓		
3.	Hon. Marvin R. Baxter		✓	
4.	Hon. Tani Cantil-Sakauye	✓		
5.	Mr. Anthony P. Capozzi	✓		
6.	<del>Hon. Ellen M. Corbett</del>	N/A	N/A	N/A
7.	Hon. Lee Smalley Edmon		✓	
8.	<del>Hon. Mike Feuer</del>	N/A	N/A	N/A
9.	<del>Hon. Terry B. Friedman</del>			
10.	Hon. Brad R. Hill	✓		
11.	Hon. Richard D. Huffman		✓	
12.	<del>Ms. Miriam Aroni Krinsky</del>			
13.	<del>Mr. Joel S. Miliband</del>	N/A	N/A	N/A
14.	Hon. Dennis E. Murray		✓	
15.	Mr. James N. Penrod	✓		
16.	Hon. Winifred Younge Smith	✓		
17.	Hon. Kenneth K. So	✓		
18.	<del>Hon. Sharon J. Waters</del>			
19.	<del>Hon. James Michael Welch</del>			
20.	Hon. David S. Wesley		✓	
21.	Hon. Erica R. Yew	✓		

Total: Yes 8 No 5 Abstain \_\_\_\_\_ Absent \_\_\_\_\_

  
 William C. Vickrey  
 Secretary to Judicial Council

<sup>1</sup> The Secretary will read each voting member's name, in alphabetical order, with the Chair last. Each member, as his or her name is called, responds in the affirmative or negative as shown above. If the member does not wish to vote, he or she answers "present" (or "abstain").

After each member speaks, the Secretary then repeats that member's name and notes that answer in the correct column. At the conclusion of the roll call, the names of those who failed to answer can be called again or the chair can ask if any voting member entered the room after his or her name was called. Changes of vote are permitted at this time, before the result is announced.

In roll call voting, a record of how each member voted, as well as the result of the vote, should be entered in full in the minutes.