

Invitation to Comment

Title	Criminal Law: Firearm Relinquishment Protocol in Restraining Order Cases (adopt rule 4.700 of the California Rules of Court)
Summary	Rule 4.700 of the California Rules of Court would establish procedures for courts issuing criminal protective orders to determine whether a defendant who owns, possesses, or is in control of a firearm relinquished the firearm under section 527.9 of the Code of Civil Procedure.
Source	Domestic Violence Practice and Procedure Task Force, Hon. Laurence Donald Kay (Ret.), Chair
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Discussion

On September 6, 2005, Chief Justice Ronald M. George appointed the Domestic Violence Practice and Procedure Task Force (task force) to recommend changes to improve court practices and procedures 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 in matters where the court has issued a criminal protective order.

In 2008, the Judicial Council approved the final report of the task force and directed the task force to implement the guidelines through various means, including rules of court. This proposal would address an existing lack of guidance for courts regarding mandatory firearm relinquishment in criminal protective order matters. The proposal closely tracks the task force’s criminal court protective order firearm relinquishment guidelines.

Background

Under Penal Code section 136.2(d)(1), anyone subject to a criminal protective order¹ is prohibited from owning, possessing, purchasing, or receiving a firearm. Furthermore, 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

¹ “Criminal protective order” means an order issued pursuant to Penal Code section 136.2.

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.*)

The court may grant an exemption from the relinquishment requirement for a particular firearm if the defendant can show that the firearm is necessary as a condition of continued employment and that the employer is unable to reassign the defendant to another position where a firearm is unnecessary. (Code Civ. Proc., § 527.9(f).) If an exemption is granted, the order must contain specified limitations on possession of the firearm. If the defendant is a specified peace officer, additional limitations on firearm possession apply. (*Ibid.*)

Anyone subject to a criminal protective order is also prohibited from owning, possessing, or having under his or her custody or control any ammunition, except under rare circumstances. (Pen. Code, § 12316(b)(1).) There is no relinquishment or sale requirement for ammunition as there is for firearms.

Current Practice

In its report submitted to the Judicial Council in February 2008, the task force noted that the courts have a necessary and important role in achieving the goal of removing firearms from those who are legally barred from possessing them. Research indicates that access to a firearm by an abusive partner increases the risk of homicide for women in physically abusive relationships.²

During development of the proposed rule, task force members noted that they are aware of very few courts that have procedures to identify which defendants have firearms or whether the firearms have been relinquished. However, a person protected by a restraining order may believe that when the court orders the defendant to relinquish specified firearms, law enforcement and the courts will take steps to ensure that the order is

² J.C. Campbell, D. Webster, J. Koziol-McLain, C. Block, D. Campbell, M. A. Curry, et al. "Risk Factors for Femicide in Abusive Relationships: Results From a Multi-Site Case Control Study." (2003) 93 *American Journal of Public Health*: 1089–1097.

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.

Proposal

Rule 4.700 of the California Rules of Court would require a court, upon issuing a criminal protective order under Penal Code section 136.2, either during the pendency of the criminal case or as a condition of probation under Penal Code section 1203.097,³ against a defendant charged with a crime of domestic violence as defined in Penal Code section 13700, to find if there is good cause to believe that the defendant has immediate possession or control of a firearm.

If the court finds good cause to believe that the defendant has immediate possession or control of a firearm, the court would be required to set a review hearing within 48 hours of issuance of the order to determine whether the defendant sold, surrendered, or is no longer in possession of the firearm as required under section 527.9 of the Code of Civil Procedure. In some cases, it would be difficult for the court to schedule the hearing within 48 hours of issuance of the order. For example, the defendant might be in custody and unable to immediately coordinate a sale or relinquishment of firearms. Or the court may issue the order on a Thursday and be unable to schedule a review hearing until the following Monday. Therefore, the rule would specify that, if circumstances warrant, the court may extend the review hearing for up to four days.

The rule would require that a review hearing be set only in the limited number of cases where the court finds good cause to believe that the defendant has a firearm within his or her immediate possession or control.

If the court sets a review hearing, the court would have discretion to take the matter off calendar if the defendant files a sale, relinquishment, or other specified receipt. The court may not consider the failure to file any of the specified forms as evidence that the defendant owns, possesses, or controls any firearms.

³ Penal Code section 1203.097(a) requires the terms of probation to include a criminal court protective order. Although the term “criminal court protective order” is not defined in section 1203.097, it is understood to mean a protective order issued under Penal Code section 136.2. As previously noted, a person subject to a protective order issued under Penal Code section 136.2 is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm while the order is in effect. The person must relinquish any firearms in or subject to his or her immediate possession or control pursuant to Code of Civil Procedure section 527.9. (Pen. Code § 136.2(d).)

At the review hearing, if the court finds that the defendant has a firearm in or subject to his or her immediate possession or control, the court must consider whether bail, as set, or defendant's release on own recognizance is appropriate. If the defendant does not appear at the scheduled review hearing, the court should issue a bench warrant.

Constitutional Considerations

During development of the proposal, the task force discussed the implications of the defendant's right against self-incrimination under the Fifth Amendment of the United States Constitution. The proposal, as drafted, does not require the defendant to make any statement regarding ownership or possession of firearms.

Court Administration Considerations

During development of the proposed rule, the task force discussed the effect of additional review hearings on court administration. The proposal 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. Those are precisely the cases that pose a serious risk of gun violence against the protected person. The task force concluded that the burden of additional court hearings in the limited circumstances that would be required by the proposed rule would be outweighed by the serious public safety considerations inherent in these matters.

The text of the proposed new rule is attached.

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

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

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

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6 This rule applies when a court issues a criminal protective order under
7 California Penal Code section 136.2 during a criminal case or as a condition
8 of probation under Penal Code section 1203.097(a)(2) against a defendant
9 charged with a crime of domestic violence as defined in Penal Code section
10 13700.

11
12 **(b) Purpose**

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14 This rule is intended to:

15
16 (1) Assist courts issuing criminal protective orders to determine whether a
17 defendant subject to such an order owns, possesses, or controls any
18 firearms; and

19
20 (2) Assist courts issuing criminal protective orders to determine whether a
21 defendant has complied with the court's order to relinquish or sell the
22 firearms under section 527.9 of the Code of Civil Procedure.

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

25
26 (1) At any hearing when the court issues a criminal protective order, the
27 court must consider all credible information, including information
28 provided on behalf of the defendant, to determine if there is good cause
29 to believe that the defendant has a firearm within his or her immediate
30 possession or control.

31
32 (2) If the court finds good cause to believe that the defendant has a firearm
33 within his or her immediate possession or control, the court must set a
34 review hearing to ascertain whether the defendant has complied with
35 the requirement to relinquish the firearm as specified in section 527.9
36 of the Code of Civil Procedure. The review hearing should occur within
37 48 hours after issuance of the criminal protective order. If
38 circumstances warrant, the court may extend the review hearing to

1 occur within 4 court days after issuance of the criminal protective
2 order. The court must give the defendant an opportunity to present
3 information at the review hearing to refute the allegation that he or she
4 owns any firearms.

5
6 (3) The court must order the defendant to personally appear at the review
7 hearing.

8
9 (4) The court may, in its discretion, take the matter off calendar if the
10 defendant has filed one or more of the following documents:

11
12 (A) a sale or relinquishment receipt, as specified in section 527.9 of
13 the Code of Civil Procedure;

14
15 (B) a copy of California Department of Justice form FD 4036, Notice
16 of No Longer in Possession (NLIP), filed with the California
17 Department of Justice for any firearm that is entered in the
18 defendant's name in the Automated Firearms System database; or

19
20 (C) a copy of a report of an allegedly lost or stolen firearm as
21 submitted to law enforcement.

22
23 (5) The court may not consider the failure to file any of the specified forms
24 as evidence that the defendant owns, possesses, or controls any
25 firearms.

26
27 **(d) Review hearing**

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29 (1) At the review hearing, if the court finds that the defendant has a firearm
30 in or subject to his or her immediate possession or control, the court
31 must consider whether bail, as set, or defendant's release on own
32 recognizance is appropriate.

33
34 (2) If the defendant does not appear at the hearing, the court should issue a
35 bench warrant.

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.

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.

Item SPR09-30 Response Form

Title: Domestic Violence: Firearms Relinquishment in Criminal Cases (adopt Cal. Rules of Court, rule 4.170)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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Mail: Ms. Camilla Kieliger
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San Francisco, CA 94102

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DEADLINE FOR COMMENT: 5:00 p.m., Wednesday, June 17, 2009
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Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.