

Firearms and Civil Protection Orders: Answers to Judges' Frequently Asked Questions

By Darren Mitchell, JD, NCJFCJ Consultant

Our jurisdiction's protection order laws are silent on firearms and I have no explicit authority to order them surrendered. Is there anything I can do to protect victims from abusers' access to guns?

For judges who do not believe that their state statutory authority enables them to address firearms in protection orders, there are other strategies to protect victims from abusers' access to firearms. The federal Gun Control Act prohibits possession of firearms by respondents against whom qualifying protection orders have been issued. See 18 U.S.C. 922(g)(8) and this [checklist](#) for more details. Judges should provide both oral and written notice of the federal prohibition. In fact, most protection order forms include notice because it is a requirement for eligibility for federal Violence Against Women Act funding.

Although additional explicit state statutory authority is ideal, judges in states without firearms-specific language in their civil protection order codes have drawn upon sources of implicit authority to include prohibitions on firearms. Statutes in some jurisdictions include what is known as "catch-all" language, such as "any other relief the court determines necessary to protect the petitioner and other household members," upon which judges can base firearm provisions. For instance, under Ohio's protection order code the order may "grant other relief that the court considers equitable and fair..." (Ohio Rev. Code 3113.31(E)(1)(h)). Courts in Ohio have affirmed that this authorizes inclusion of firearms prohibition provisions in protection orders under certain circumstances, and the official Ohio protection order form includes a discretionary surrender provision. Similarly, Oklahoma's catch-all provision ("any terms and conditions in the protective order that the court reasonably believes are necessary to bring about the cessation of domestic abuse") provides the authority to include a discretionary firearms surrender provision in that state's official protection order form.

In addition, by ensuring that protection orders are entered into state and federal databases, courts can facilitate the National Instant Criminal Background Check system's ability to prevent respondents from purchasing firearms while the order is in effect. Providing information regarding entry of orders to the state firearms licensing agency may enable the agency to revoke existing licenses or permits held by respondents.

Finally, for respondents who also have pending criminal domestic violence cases, pre-trial bail/bond conditions or criminal protection orders offer an opportunity to

prohibit firearms possession and/or order surrender of firearms as part of pre-trial bail/bond conditions or criminal protection orders.

I am aware that federal law may prohibit respondents from possessing or purchasing firearms based upon a protection order that I issue. How does this work, and is there anything I can do to facilitate enforcement of the federal law?

Judges can take several important steps to support enforcement of federal firearms prohibitions, including the prohibition against purchase of a firearm by the respondent as implemented through the Brady Handgun Violence Prevention Act (Brady Act; Public Law 103-159 (1993)). First, judges should ensure that their protection order forms comply with the requirements of the federal law under the Federal Gun Control Act provision cited above, 18 U.S.C. § 922(g)(8). Judges can consult with personnel from the FBI's National Instant Criminal Background Check System (NICS) program for this purpose. Second, judges should recognize that protection orders issued both by consent and by default qualify under the federal prohibition and should be entered into protection order databases (*ex parte* orders may be entered into databases, but they are not qualifying orders under federal law because there has not yet been a hearing or opportunity to be heard on the order). Judges should investigate whether their protection orders are being entered into the proper state or tribal registries and that entry is also made into the National Criminal Information Center Protection Order File, where they are readily accessible to NICS personnel conducting background checks. Finally, judges should ensure that courts respond immediately to inquiries from the NICS program regarding individual protection orders, in light of the fact that NICS personnel have only three business days to investigate whether a person is prohibited from purchasing a firearm before the transaction must be permitted despite an incomplete or inconclusive investigation.

I cannot do this alone. With whom should I collaborate and how can I go about getting them on board?

It is critical to recognize that a court acting unilaterally, despite its position of significant power within the justice system, cannot take all actions necessary to learn about and prevent abusers' access to firearms in protection order cases. Other stakeholders are essential participants in any effort, which must be collaborative and coordinated to maximize the likelihood of success. Important collaborators and their potential roles include:

Victim advocates and civil legal attorneys provide victims with information regarding the protection order system and the relief available regarding firearms; conduct safety planning and assist victims with making informed decisions about disclosures and information to be shared with the court and others; assist with gathering of information regarding abusers' access to firearms and specific information regarding the firearms; and help ensure that the court receives all

relevant information regarding abusers' access and use of firearms during the protection order process.

Court administration and staff provide online and written information on court processes and firearms relief for victims; assist victims with filing of necessary paperwork (without providing legal advice); gather information regarding firearms access by respondents available from court records; meet with respondents after issuance of orders requiring surrender of firearms to ensure they understand their responsibilities; monitor compliance with surrender orders; and ensure that required affidavits/receipts of surrender are filed (in some courts, case managers or compliance officers assume these responsibilities).

Law enforcement officers respond to domestic violence calls and inquire about firearms access and seize or obtain surrender of firearms, where authorized; document in incident reports information regarding firearms involved or accessible to perpetrators; receive information regarding respondents' access to firearms (e.g., through service packets); take steps during service to explain firearms surrender requirements, take firearms, document information regarding firearms, and notify victims about the outcome of service; accept and store firearms; take appropriate steps to ensure that transfers are made only to eligible third parties; and ensure that firearms are returned only after a background check indicates that the respondent is not prohibited from possessing firearms.

Prosecutors consider bringing enforcement actions in concert with law enforcement when failure to comply is identified; in some jurisdictions, coordinate firearms surrender programs (e.g., in King County (Seattle), WA, the Prosecuting Attorney's Office manages the collaborative [Regional Domestic Violence Firearms Enforcement Unit](#), which assists with the service of protection orders, removal of firearms based on those orders, and addressing non-compliance).

Achieving buy-in from some stakeholders in your community may be challenging. The NCJFCJ hosted a webinar with strategies to overcome resistance from key stakeholders, which may be viewed [here](#). Among other approaches, it is very helpful to frame the issue as one focused on the public health and safety purposes for doing the work, namely to prevent deaths and serious injuries perpetrated by respondents against victims, children, intervenors, and the wider community.

If a petitioner does not request any relief related to firearms in the petition or during the hearing on an *ex parte* protection order, I am not comfortable addressing the issue because it is beyond the scope of my authority. Is there anything I can do under such circumstances?

Because research demonstrates that respondents' access to firearms is one of the highest risk factors for intimate partner homicide (and that abusers who possess

firearms tend to inflict the most severe abuse),¹ many judges hearing *ex parte* orders ask questions about firearms as a routine practice in all cases. For judges who believe that they are restricted to the specific allegations raised in the petition, one strategy for eliciting information about firearms access from petitioners is to amend existing petitions and/or affidavits to make it easier for petitioners to provide specific information regarding firearms, such as information about the use and threatened use and about the specific firearms and their location. Several examples of such forms exist, including those used in [Washington State](#), [Wisconsin](#), and [Wyoming](#).

As explained in the question and response below, including space in petitions and affidavits is just one strategy to help courts obtain information about respondents' access to firearms, and courts should work with other stakeholders to better inform petitioners about the firearms protections available as part of civil protection orders, as well as how they can best inform the court about respondents' access to firearms.

It is very difficult for me to find out whether a particular respondent has access to firearms. Are there any strategies I can implement to get more information while not endangering victims or violating respondents' due process rights?

Courts and their partners can implement several strategies to maximize the information available regarding abusers' access to firearms. To elicit information from victims about firearms access, it is important to ensure that resources exist in the community to help victims understand the risk posed by firearms in domestic violence cases and what they can do to seek protection from the court. This can include online resources, printed brochures, other written materials, and even public service announcements. However, nothing is as effective as well-trained advocacy and legal services providers who can engage victims in confidential safety planning and help them to make informed decisions about whether and how to seek protection through the civil protection order process.

Courts should also explore other avenues for obtaining information about respondents' access to firearms to avoid placing the onus on victims. Police reports that include information about firearms can be an important source of information if they are made available to the court (and officers are trained to include that information). In addition, where authorized, judges should obtain docket information from other court cases and/or the criminal history of the respondent to determine whether firearms were used in the commission of offenses (of course, both parties should be notified about the court records consulted). In some jurisdictions, judges can obtain information about respondents' firearms licenses/permits as well. Several courts employ [compliance officers](#) or case managers who can assist with some of these tasks.

¹ See, for example, Campbell et al., "Risk factors for femicide in abusive relationships: Results from a multisite case control study," *American Journal of Public Health* (2003) 93: 1089–1097.

Once I have issued an order, it is out of my hands and I have to rely upon others in the system (law enforcement, prosecutors) to bring an action for a violation of the order if firearms are not turned in. Any suggestions that do not require that I go beyond the scope of my authority?

Judges in several jurisdictions have used [compliance review hearings](#) as a mechanism to monitor compliance with firearms provisions and to address violations. Some courts set every protection order case in which a firearms surrender provision is entered for a review hearing to assess whether all requirements have been satisfied. The review hearing may be cancelled if the respondent files required paperwork (such as an affidavit and receipt from law enforcement) demonstrating compliance with surrender orders. Judges have found that compliance hearings can serve several helpful functions, including demonstrating to the respondent and to all present in the courtroom that the court takes its orders seriously and non-compliance will be identified and addressed, and providing clear instructions where respondents fail to comply due to a lack of understanding of their responsibilities or the process.

Ideally, where respondents fail to comply with surrender provisions even after they have appeared before the court for compliance review, the court will take additional steps to compel compliance and hold the respondent accountable. Contempt hearings are an option in most jurisdictions, and some courts have the authority to enter search warrants to recover firearms where applicable legal standards are met.

If respondents want to comply with my firearms surrender orders, they do. If not, we have what amounts to an honor system; no one really knows or confirms whether the respondent has retained possession of the firearms. Are there any strategies to address this?

It is true that without effective mechanisms to hold respondents accountable for compliance with firearms surrender orders beyond what they self-report to the court, no system can move beyond an honor system. The use of compliance review hearings, as described above, is an important strategy to create what Sandra Shanahan, the director of the King County, WA Regional Domestic Violence Firearms Enforcement Unit, calls a “culture of compliance.” In addition, judges have reported the effectiveness of repeatedly informing respondents, at multiple stages of the process and by multiple professionals, about the fact that they cannot possess or purchase firearms for the duration of a protection order and that they must surrender any firearms they possess.

Service of process remains an untapped opportunity in many jurisdictions for firearms to be obtained. To take advantage of this opportunity, at a critical juncture of the process from a risk standpoint, serving officers should receive information about respondents’ access to firearms and their location (a possibility when protection order petitions facilitate the provision of this information to the court), and they should implement protocols that include informing the respondent about the order’s firearms-related requirements and requesting that they turn over their firearms at the time of service. Judges can encourage serving agencies to adopt these strategies and ensure that the

serving officers receive as much information as possible regarding respondents' firearms access before they serve orders.

It should be noted that efforts in this area sometimes can be impeded by the perspective that abusers who want to obtain a firearm can do so illegally in any event, so why put in the work? It is important to recognize, however, that many abusers do in fact comply with court orders and wish to avoid criminal liability, and that even an imperfect system can protect many people from firearms violence. In addition, research shows that obtaining firearms on the illegal gun market is not as easy as commonly understood. As [noted](#) by Daniel Webster, Professor, School of Public Health, Johns Hopkins University,

“Yes, some criminals will be able to steal or purchase guns already in circulation. But many of the estimated 300 million guns in civilian hands can't be easily acquired by criminals. Lots of gun owners lock their guns in safes or have other ways to secure their firearms, practices that can be increased by laws and educational campaigns. And it's not as easy or risk free for criminals to buy guns in the underground market as is commonly believed. Duke economist Philip Cook has studied Chicago's underground gun market and said, 'there may be a lot of guns, but there is a shortage of trusted sellers.' With greater accountability measures and choking the supply of new guns into the underground market, street prices will rise and fewer dangerous people will have guns.”

I include an order to surrender firearms in *ex parte* protection orders where appropriate but it appears that respondents rarely comply with that order. Is there anything I can do to address this before the hearing on the final order?

Given the short timeframe between issuance of an *ex parte* protection order and the hearing on the final order, monitoring compliance with firearms surrender provisions is quite challenging. As described above, service of process can be conducted in a way that helps ensure compliance: providing information for respondents along with the service paperwork about their responsibilities; asking questions about firearms; and taking steps to obtain firearms at the point of service. In addition, officers from the serving agency can conduct follow up to ensure that the respondent has complied and to answer any questions they may have.

If feasible, the court can require that the respondent file an affidavit and/or receipt demonstrating compliance with the surrender order before the hearing on the final order. In any event, the court should address the respondent's compliance status at the final hearing and enter any necessary orders/provisions to compel compliance within an established timeline.

Once a respondent gives their firearms to a third-party at any point during a protection order case, I don't think that there is anything I can do. I do not have legal authority over that third party and, as long as the respondent does not possess the firearms, there is no problem that I can see. Is that right?

Although in theory having a respondent transfer his or her firearms for the duration of the protection order to a third party who is legally permitted to possess firearms may be a reasonable practice in some circumstances, it presents too many potential pitfalls to be permitted without court oversight. Most obviously, the respondent could opt to transfer firearms to a person who will allow him or her access to (i.e., constructive possession of) the firearms. The third party simply may not know the consequences of permitting access, or the reasons why the respondent has asked the third party to take the firearms. In addition, without a background check being conducted on the third party, it is impossible to be certain that he or she is not prohibited from possessing firearms under state or federal law.

Court regulation of the process is critical to ensure safety. The best practice to ensure that the transfer is done in a safe fashion and that the third party is eligible to possess the firearms is to order respondents initially to surrender their firearms to a law enforcement agency, which subsequently could, in response to a court order, transfer the firearms to the third party after conducting a background check to confirm eligibility. As part of this process, both the respondent and the third party should be required to complete affidavits acknowledging the fact that the respondent is a prohibited person and that it is a criminal violation to knowingly permit the respondent to have access to a firearm.

Some courts order that the respondent and third party both appear at a hearing before the judge will approve the transfer. The courts use that opportunity to ensure that the background check has confirmed the third party's eligibility, that both the respondent and third party understand the consequences of allowing access to the firearms, and to provide the victim with the opportunity to object to the transfer if desired. Examples of affidavits used by courts are available here: [Louisiana](#); [Pennsylvania](#); and [Vermont](#).

Once an order that includes a firearms prohibition expires, respondents are eligible to get their weapons back. What practices could the court or other stakeholders implement to ensure the safety and effectiveness of that process?

An effective process for return of firearms to respondents after expiration of all firearm prohibitions should include the following key elements:

- The respondent should be required to petition the court for the return of firearms; this approach is used in [California](#), [New Hampshire](#), and [North Carolina](#), among others.
- Notice should be provided to the victim, but appearance at any hearing should not be required.
- A criminal background check for eligibility should be conducted prior to approval of the return; the process should use the equivalent of the [affidavit](#) that must be

submitted for purchases of firearms in the NICS process and a nationwide search should be conducted.

The law enforcement agency that is responsible for accepting and storing firearms turned in by respondents has asserted that it does not have room or the facilities required to store the weapons to prevent damage (and some firearms are extremely valuable). What can be done about this?

In some states, law enforcement agencies are permitted to charge storage fees for firearms surrendered due to protection orders, which may be used to offset costs and enhance facilities. Creative approaches to the storage issue include enlisting federally licensed firearms dealers or gun ranges as storage locations. Typically, a fee will be charged to the firearms owner; in Vermont, a statute addresses storage and the fees that may be charged. A report by Prosecutors Against Gun Violence and the Consortium for Risk-Based Firearms Policy, [*Firearm Removal/Retrieval in Cases of Domestic Violence*](#), includes several recommendations regarding firearms storage.

This project was supported by Grant No. 2016-TA-AX-K026 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this website/publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Office on Violence Against Women, U.S. Department of Justice or the National Council of Juvenile and Family Court Judges. The recipient also agrees to ensure that any subrecipient at any tier will comply with this condition.