



IMPLEMENTING AN EFFECTIVE FIREARM RELINQUISHMENT PROTOCOL

NATIONAL RESOURCE CENTER ON
DOMESTIC VIOLENCE AND FIREARMS | BWJP

ABOUT US

The National Resource Center on Domestic Violence and Firearms (NRCDVF) is a project of BWJP. NRCDVF aims to (1) prevent domestic violence-related firearm homicides; (2) provide quality practice and policy expertise; and (3) to build the capacity of individuals, organizations, and coalitions of jurisdictions to proactively address domestic violence and firearms. Expert consultation and resources provide the road map for communities to improve implementation of firearm prohibitions at preventdvgunviolence.org.

David W. Keck, Director, National Resource Center on Domestic Violence and Firearms
Alicia B. Nichols, Deputy Director, National Resource Center on Domestic Violence and Firearms
Amy J. Sánchez, Chief Executive Officer, BWJP
Kristine Lizdas, Director of Policy and Practice, BWJP
Christina Jones, Deputy Director of Policy Initiatives, BWJP
Anton Tripolskii, Attorney Advisor, BWJP

Recommendations and concept by David W. Keck on behalf of BWJP.

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ABSTRACT

Approximately two out of three women murdered each year in this country are killed by a male intimate partner using a firearm.

Previous acts of domestic violence have been identified as a predictive indicator for future violence. Relinquishment of firearms by domestic abusers has been shown to reduce the number of intimate partner homicides. Federal law prohibits possession and acquisition of firearms and ammunition for certain individuals found to have committed domestic violence. Some states have taken the further step of requiring that domestic abusers relinquish their firearms. These relinquishment mandates are largely ignored, very few states actually enforce them.

The recommendations proposed in this document are intended to provide guidance for effective implementation of existing laws.

OVERVIEW

Once a person is found by a court to have committed certain domestic violence related offenses, they are prohibited by federal law from purchasing or possessing firearms. Unfortunately, firearm dispossession is not mandated by federal law. Some state laws mandate removal of firearms possessed by prohibited persons. Unfortunately, most states with these laws find them too difficult to implement. We provide this guidance because we have seen offenders commit abuse against their intimate partners with firearms even after the court orders the offenders to give them up.

This document will address the legal impediments along with other considerations that jurisdictions face when implementing firearm relinquishment orders.

As the National Resource on Domestic Violence and Firearms, BWJP has developed a series of questions that judges and/or other stakeholders can utilize to determine if they have entered an effective firearm surrender order.

1. Does the court decision definitively render the defendant ineligible to possess guns?

2. Does the defendant possess guns?

3. Has the court specifically ordered surrender of those guns?

4. Is there a means of ensuring compliance?

This model protocol contemplates a firearm relinquishment process which emphasizes public safety through separation of domestic abusers from their firearms. We do not need new laws to achieve uniform relinquishment.

The focus of this discussion is on the most effective means of legally removing firearms from individuals determined by the legal system to be ineligible to possess or acquire them. This method relies on evidence-based practices which at times may elevate the compelling interest of keeping firearms out of the hands of certain individuals over a more traditional approach of pursuing criminal convictions.

¹ This model contemplates prohibitions which are imposed by courts, not those arising from dishonorable discharges from the military or because of illegal immigrant status.

² This document uses the term defendant which is commonly used in criminal court. The term respondent is used in most civil protective order hearings. For the purposes of clarity in this document, we only use the term defendant.

I. CURRENT LAW

Federal law prohibits possession and acquisition of firearms and ammunition by nine categories of individuals. The model protocol proposed in this document is focused on the two categories which apply specifically to domestic abusers: those subject to a domestic violence protection order (18 U.S.C. Sec. 922(g)(8)); those convicted of a misdemeanor crime of domestic violence (18 U.S.C. Sec. 922 (g)(9)). Firearm relinquishment, where it is systematically practiced, mostly centers around domestic violence prohibitors. Domestic violence has been identified as a predictive indicator for future violence. This may be one reason why relinquishment of firearms by domestic abusers results in reduction of intimate partner homicide.

Federal law does not require relinquishment of firearms for prohibited individuals. Explicitly federal law does not authorize relinquishment orders, nor does it prevent their implementation at the state level. Relinquishment orders are implicitly authorized in the sense that the law provides penalties for those individuals who do not voluntarily dispossess themselves of their guns. Violators are prosecuted for possessing or acquiring guns while under a prohibition, but there is no explicit obligation to relinquish.

Sixteen states expressly require all individuals convicted of domestic violence crimes to relinquish their firearms after conviction. Seventeen states explicitly require all people subject to domestic violence restraining orders to relinquish their firearms for the duration of the court order. State law is not uniform. Practices vary greatly from state to state and unfortunately even for the states which have relinquishment laws many remain unenforced. This model protocol does not create new law for states. It creates a framework for states to follow which allows for the effective enforcement of current federal law.

II. ANALYSIS OF THE PROTOCOL

The Model Protocol for Effective Firearms Relinquishment by BWJP's National Resource Center on Domestic Violence and Firearms utilizes evidence-based practices. The protocol prioritizes the safety-first principle of keeping firearms out of the hands of certain individuals over the traditional approach of focusing on criminal convictions. Evidence shows that relinquishment of firearms by domestic abusers results in the reduction of intimate partner homicide.

Effectiveness is further enhanced by addressing the prohibition as it comes to the court's attention to address prohibited status and the relinquishment order contemporaneously. Each of the four questions are deliberately drafted and should be asked in this specific order. They are discussed in detail below.

1. Does the court decision definitively render the defendant ineligible to possess guns?

The determination that the defendant is ineligible under either federal or state law or both should be made in open court with the parties present. Ideally the court has already advised the parties of this consequence before the parties have committed to a decision that determines the outcome of the court proceeding. This is a matter of fairness to the parties. The purposes of the relinquishment protocol, that is, removal of guns from a prohibited person, are not advanced if

³ Information about U.S.C. 922 (g) (8) and g (9) is available at <https://www.preventdvgunviolence.org/>

someone is caught by surprise after the fact. In order to be effective, relinquishment orders must be enforceable. If a defendant is later found to be in possession of a gun in violation of the law, he should not have the opportunity to claim he was unaware of that consequence.

It should also be noted, however, that many individuals may already be prohibited from possessing guns due to other circumstances. For reasons already set forth in this discussion, the defendant may have failed to relinquish firearms on previous occasions.

The proceedings contemplated here put an end to the defendant's ability to avoid the consequence of relinquishing firearms.

Having been advised that the current proceeding will result in loss of the privilege to possess firearms, the defendant then has actual notice that further possession is illegal. If the court then outlines the process by which the defendant is to be dispossessed of firearms, there is no room for ambiguity.

2. Does the defendant possess guns?

The court next determines if the now prohibited defendant currently possesses, or has access to, firearms. With the exception of California, there is no other electronic database documenting this information at either the state or federal level. The court must therefore rely on information gathered at or prior to the hearing.

In general, the second-most reliable source of this information is frequently the victim of the abuse. Presumably, this individual has an intimate relationship with the defendant, although this is not always true. The victim may have detailed and reliable information with respect to location and number of guns that defendant can access. While some victims may choose to provide this information, for many it may place them in danger of retribution from the defendant. It is therefore not recommended that victims be placed in a position where they feel compelled to come forward with this information. If a victim chooses to volunteer this information it should be allowed, but for example, victims should not be questioned in open court, in the presence of the defendant, if they know of guns defendant possesses.

The defendant is presumably the most accurate source of information about guns possessed. This protocol places the burden on the defendant. The defendant is ultimately the person who faces criminal prosecution if firearms are not relinquished. The problem is that the defendant may implicate himself in an ongoing offense by cooperating with the inquiry. Defendant is placed in a position where either course of action may subject him to criminal prosecution.

One solution to this dilemma is to compel the defendant to disclose information about all guns openly and completely. Because the response is compelled, it is an involuntary statement and cannot be used against the defendant. In some jurisdictions "use immunity" is incorporated into the relinquishment protocol. Whether formally tendered or not, immunity should be understood to be a component of the process. In other words, because the court compels the response, it is not a voluntary statement. However, judges are not a part of the prosecution team. The court would only compel such a statement with the understanding that by doing so, the statement is rendered

⁴ In fact, under 34 U.S.C. 10449(e), as a condition for certain grant funds, every state and territory must certify that their judicial administrative policies and practices include notification to domestic violence offenders of the requirements of 18 U.S.C. 922(g)(8) and (9) and any applicable related federal, state, or local laws. The DOJ recommends the court make these warnings to anyone who might be impacted by the firearms prohibitors.

inadmissible for prosecution purposes. Provided the defendant answers truthfully and completely, there is no risk of exposure to criminal prosecution.

The defendant who is in possession of firearms at the time he becomes ineligible to possess them is thus released from the bind of not knowing how to proceed. This is one legal course which avoids this quandary. It is understood that this process may allow those defendants who on previous occasions ignored the obligation to relinquish firearms when ordered to do so may escape criminal prosecution for past lapses in judgment. The broader objective of removing guns at this point is served, however. This process also places the burden of complying with the order squarely on the defendant, where it most properly rests.

3. Has the court specifically ordered surrender of those guns?

The next step in the protocol follows naturally from the first two steps. Having determined that the defendant is ineligible to possess firearms and having obtained information about which guns defendant has access to, the court is in a position to enter an order to relinquish those guns. The order should specifically order the defendant to relinquish those specific guns at a specific time and place and in a manner that has been predetermined as a part of the relinquishment protocol.

The specifics as to this part of the order will vary from jurisdiction to jurisdiction. It is vital however that these details be spelled out as specifically as possible, in order to leave no ambiguity as to the defendant's obligation under the order. A warning about the consequences for failure to comply (i.e., sanctions, contempt action, criminal prosecution) should also be included in this order.

4. Is there a means of ensuring compliance?

The court should then schedule a compliance review hearing before concluding this hearing. Defendant is ordered to appear at the compliance hearing and show cause why the relinquishment order has not been followed. It is advisable to provide a mechanism whereby the defendant can establish proof of relinquishment prior to the hearing, in which case the hearing may be cancelled.

This procedure results in an optimal method of ensuring that the defendant has complied and relinquished those firearms as ordered without the necessity of investigation to establish compliance. The burden of proof as to compliance is placed on the defendant. The defendant is, after all, the individual who faces criminal consequences for failure to follow through. Neither the court nor law enforcement is burdened with monitoring the defendant's compliance. When the time and date for the compliance hearing comes, the defendant may appear and establish cause for failure to comply. Absent this, the defendant is in non-compliance and sanctions (i.e., contempt action, criminal prosecution, etc.) may follow.

By following the protocol set forth above, the court can be satisfied that the four questions are answered. This may be summarized in one sentence:

"The defendant has provided proof to the court's satisfaction that he/she has dispossessed himself/herself of all firearms previously identified, having been determined to be ineligible to possess them."

III. THE DEMONSTRATED EFFECTIVENESS OF RELINQUISHMENT

Compared to states without a state-level domestic violence restraining order firearm restriction law, states with such a law and a relinquishment provision experienced an associated 12% decrease in intimate partner homicide and a 16% decrease in firearm intimate partner homicide. States with such a law but without a relinquishment provision did not experience a statistically significant difference between their intimate partner homicide rates and the rates of states without the restraining order firearm restriction.

To be effective, firearm relinquishment must be sustainable. Routine assessment for both internal and external safeguards must be built in. Once a policy or practice is newly established, it runs the risk of becoming ineffective through inattention over time. A means of ensuring that the Model Protocol is followed as intended must be included in the planning stage of implementation.

INTERNAL

Recordkeeping is an integral component of the Model Protocol. To function well, orders to relinquish and findings of compliance with these orders must be documented. Over time, trends in compliance should describe a recognizable pattern. This is important as an objective means of determining that the system is functioning properly and whether changes to the process should be made.

EXTERNAL

There are few communities which have implemented a systematic protocol for firearms relinquishment. As more communities implement the Model Protocol it is anticipated that statistical analyses could follow. We recommend external assessments be included as a component of the Model Protocol. Assessments may or may not be tied to funding for these projects. It is worth repeating that firearm relinquishment is still a new field. A lot will be learned from the gathering of national data.

IV. ADDRESSING CHALLENGES TO IMPLEMENTATION

Many jurisdictions have attempted to implement firearm relinquishment protocols only to find challenge that seem insurmountable. Some of these are common to almost every jurisdiction. All can be addressed within the parameters of local and state law. The most common examples are discussed below:

SECOND AMENDMENT

Often presumed as an impediment to firearm surrender, in *District of Columbia v. Heller*, the Supreme Court cited longstanding prohibitions on firearms possession by specific individuals as “presumptively reasonable.” Federal courts have consistently upheld firearm relinquishment protocols following

5 Zeoli et al., *American Journal of Epidemiology*, Volume 187, Issue 7, July 2018,

6 *Id.*

7 Like most rights, the right secured by the Second Amendment is not unlimited...nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms. *District of Columbia v. Heller*, 554 U.S. 570 (2008). See also 18 U.S.C. § 922.

Heller. The perception that Heller somehow prohibits relinquishment persists and manifests through passive resistance. Many jurisdictions profess an interest in removing guns from violent individuals but hesitate to do so out of concerns over the legality of such action.

FIFTH AMENDMENT

Disclosing that a person already prohibited from possessing firearms actually does so may expose that person to criminal liability. The 5th Amendment states that people cannot be compelled to be witnesses against themselves. Someone who possesses guns in violation of a prohibition faces a difficult choice: continue to possess and risk exposure, or attempt to relinquish in an effort to avoid additional punishment?

Acknowledging that this could involve discovering illegal activity prevents this process from moving forward. By shifting the focus away from prosecuting past offenses to emphasizing the social utility of taking guns out of the hands of dangerous people, we reach a compromise. We advance the aim of reducing firearm violence if a statement about gun possession by a defendant and the act of relinquishment are both immune from criminal prosecution.

STORAGE

The safe storage of relinquished firearms is frequently mentioned as an impediment. This is the most-cited reason why firearm relinquishment cannot be effectively implemented. The objections take two forms: either that there is insufficient space to store so many guns, or the liability for damage that may occur to firearms in storage. These do not present insurmountable obstacles to implementation. Most jurisdictions approach storage of firearms relinquished as a separate basis from those seized as evidence of a crime. The latter may have evidentiary value in many forms. These should not be cleaned, touched, or otherwise handled. The former is merely stored as a means of ensuring that the defendant does not take possession of them until it is legally permissible to do so. There is no reason why law enforcement should not regularly maintain these firearms to ensure that no harm comes to them.

With respect to the space required to store firearms, this should not present a significant problem. We know of no jurisdiction that has encountered this problem to date. If the resources necessary are unavailable, then resources must be reallocated.

V. REMAINING CONSIDERATIONS

THIRD-PARTY TRANSFER

Many states authorize a third party designated by the defendant to hold relinquished firearms until the defendant regains the right to possess. Some defendants distrust law enforcement to hold their firearms safely and return them when the disqualification terminates. Relinquishment through third parties also relieves some of the burden of storing firearms with law enforcement.

But this method is problematic. Most states provide that an affidavit signed by the third-party, the defendant, or both as the most common form of proof required. Most jurisdictions do not require review to ensure that this has taken place. Most troubling though is that most jurisdictions do not provide a method for determining if the proposed third party is in fact an appropriate person to fulfill this obligation.

A Supreme Court case seems to suggest that this procedure violates federal law. The court held that transfer of a firearm to a third party designated by the defendant is not permitted, unless a court determines that the third party is an appropriate person. Specifically, the court must determine that the proposed third party will take the obligation to keep guns away from the defendant seriously.

RETURNING FIREARMS

Returning firearms to the defendant is a relatively straightforward process. Once the disqualifying event has terminated, for example, the domestic violence protection order expires, the defendant petitions the court for return of the guns. Provided the court is satisfied that the protection order has expired, the court orders local law enforcement to conduct a new background check to determine if other prohibitions on the defendant's ability to possess guns legally exist. Provided there are none, the court orders the guns returned.

Some disqualifications, such as the conviction for a misdemeanor crime of domestic violence, carry a lifetime ban on possession of firearms and ammunition. It should be noted that this does not impact the defendant's ownership rights. What is prohibited is the possession or acquisition of guns. Defendants are free to sell their guns at any time during the relinquishment process.

XI. CONCLUSION

Effective firearm relinquishment protocols can save many lives. To be effective, protocols must minimize opportunities that defendants have to avoid the obligation to surrender firearms.

This requires careful planning, cooperation, and communication between key players within the legal system. This in turn requires a commitment to plan, implement, assess, and prioritize removing guns from individuals prohibited from having them.

It should be acknowledged that many prohibited individuals may be motivated to avoid the obligation to voluntarily relinquish. While there may be other reasons behind someone's reluctance to surrender guns, the risk that people lose their lives due to careless implementation or no follow-through is too high to gamble on.

Communities implementing relinquishment protocols should keep survivor safety as the paramount concern. Of course, keeping survivors safe costs money and time. We believe that implementation of this Model Protocol for Effective Firearms Relinquishment minimizes these costs while maximizing the effectiveness of relinquishment and likelihood of safety for survivors.



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