

Appendix IX
Draft Comprehensive Restraining Order
Improvement Plan

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Draft Comprehensive Restraining Order Improvement Plan

The restraining order clean up project aims to address problems presented by criminal and civil temporary and permanent restraining orders. The goal is to address problems and present solutions in four categories: Legislation, Technology, Policies & Training and Forms.

Concerns and Issues Presented:

Concerning Legislation:

There are seven statutory references and a court rule defining restraining orders issued to protect individuals who are victims of crime or in fear of imminent danger. Each statutory reference is designed to respond to a specific behavior or relationship. Inconsistencies exist with respect to definitions, specific provisions and penalties for violation that create problems for enforcement and understanding. Additionally, there are federal mandates and federal crime provisions that rely upon state law for prosecution.

Organization of Statutes:

Problem:

- References to restraining orders exist in every Title. Many of the references are not applicable to offenses against persons or cases of domestic violence. “Restraining order” an “injunction” are often used interchangeably and in most instances do not require arrest in the event of a violation. Restraining orders related to crimes against a person, including stalking domestic violence and sexual assault do provide for arrest in the event of a violation.
- Most states refer to restraining orders involving crimes against persons as “protection orders.” The FBI maintains a protection order file of civil and criminal orders involving domestic violence and stalking in order to assist in interstate enforcement and insta-check gun background checks.

Recommendation:

Create a title or an article that addresses all issues of restraining orders intended to provide protection for an individual. Change the name of restraining orders intended to protect an individual from threats, harassment, fear of imminent bodily harm to “protection orders.” By changing the name, there would be a distinction from other restraining orders, making it easier to enforce across state lines and making it easier to determine which orders should be sent to CBI to be maintained in the restraining order registry.

Definitions of Restrained Behavior:

Problem:

- Every Statute and the court rule have a different definition for the type of behavior that is restrained. (Please see attachment A)
- Definitions are not all complementary with the federal provisions.

Recommendation:

Change the definition of restrained behavior in all cites to restraining orders (those orders related to protecting an individual from bodily harm) to be the same. The behavior discussed in each statutory reference is sufficiently similar that creating one definition for all is easy and would provide consistency for federal prosecution, if applicable.

Possible language:

“This order prohibits harassing, abuse of the elderly, stalking, threatening or engaging in conduct that would place a person in reasonable fear of bodily injury. By the terms of the order, the restrained party is explicitly prohibited from the use, attempted use or threatened use of physical force against a person or child that would reasonably be expected to cause physical harm.”

** Whatever language is adopted would need to be inserted in the Crime of Violation of Restraining Order. CRS 18-6-803.5

Notice and Opportunity:

Problem:

- In order for restraining orders to be afforded full faith and credit across state and tribal jurisdictional lines, for federal authorities to prosecute for firearms violations and in order to prosecute a party for violation of restraining order there needs to be reasonable notice and opportunity for the defendant/respondent to be heard on the issuance of the permanent order. Not all of the statutory provisions explicitly state that the defendant must receive notice and opportunity to be heard.
- There has been some debate among law enforcement as to whether they have the authority to arrest a defendant for violation of a restraining order if law enforcement is not aware of whether the defendant has been served with the order.

Recommendation:

Adopt language for all restraining order statutes that explicitly states that the respondent/defendant needs notice and opportunity to be heard and adopt language that states explicitly the range of penalties that can be imposed in case of violation.

Training may need to be conducted to instruct law enforcement that permanent order need not be served if a temporary order was properly served pursuant to CRS 13-14-102(5). Additionally, law enforcement should be instructed to enforce orders, regardless of whether the order appears in the CBI registry. (CRS 18-6-

803.5(3)(a-c). There may need to be some clean up regarding service of permanent orders when the defendant was served properly with the temporary order. In that case, the defendant may not have been served with the PRO, but would have had actual notice given the language on the temporary form. Proper service is a determination for the courts. Law enforcement may not be held liable for an arrest for VRO unless the arrest was made in bad faith and with malice or does not act in compliance with court rules. (CRS 18-6-803.5(5)).

Possible language:

“The respondent/defendant shall be instructed to appear before the court at a specific time and date to show cause, if any, why the temporary order should not be made permanent. The defendant is advised that failure to appear at court in accordance with the terms of the temporary order, a warrant may be issued for your arrest.

- (a) If this order is to prevent domestic abuse, the order shall be made permanent without further notice or service if the temporary order was served properly, and such a permanent order will subject you to federal and state prohibitions against possession and sale of firearms pursuant to 18 U.S.C.A. 922(g) and (whatever the CBI relies on for authority that restricts firearm sales when a restraining order is in effect).
- (b) You are notified that the permanent restraining order shall remain in effect until further order of the court.

Restraining Order issued in conjunction with a dissolution action

Problem:

- If the order is issued to prevent or address domestic violence, the order does not give the same protections available through other civil orders, yet there is a common perception that the protections exist. E.g. The restraining order in a dissolution matter does not become a permanent order in the same manner as a different type of restraining order. It may be incorporated into the permanent orders of the dissolution, but it is not submitted to CBI, so law enforcement have no access to the order.
- Temporary restraining orders issued in a dissolution matter do not have a permanent hearing and do not have the same “notice and opportunity to be heard” provisions for the respondent/defendant. As a result some of the firearms provisions may not be applicable and the temporary order is often not included in the CBI registry.

Recommendation:

A party in a dissolution matter needs to be advised of the limitation of the dissolution restraining orders if needed for protection/enforcement in domestic violence. (If not already being done.) This may require training for judges and clerks to identify those cases that may need the protections offered through Title 13.

Or, in the alternative, cases in which a restraining order is needed and incorporated into the dissolution permanent orders should be submitted to CBI.

Restraining Orders Issued pursuant to CRS 18-1-1001

Problem:

- Restraining orders are issued pursuant to CRS 18-1-1001 against any person charged with a violation of Title 18. The article addresses both restrictions against tampering with witnesses and victims of any criminal case and specific provisions related only to domestic violence cases. The article presents some inconsistencies:
 - (1) 18-1-1001(3) states that “. . . the court shall inform the defendant of restraining order effective pursuant to this section and shall inform the defendant that a violation is punishable by contempt.” Yet, 18-1-1001(4) states that “Any person failing to comply with a restraining order issued pursuant to this section commits the crime of violation of a restraining order and may be punishable as provided in 18-6-803.5.” Further, 18-1-1001(7) requires peace officers to enforce orders issued pursuant to “this section” in accordance with 18-6-803.5, which mandates arrest or seeking an arrest warrant.
 - (2) 18-1-1001(3) and 18-1-1001(6) both provide a mechanism for a defendant or the district attorney to seek modification or dismissal of the restraining order.
- Transferring restraining orders issued pursuant to title 18 CRS, is difficult because order relate to all crimes defined under title 18 CRS. Often there are not names of victims or the court is not aware of the names at the time of arraignment. The statute requires the order to be in effect from arraignment through the disposition of the case. Transferring every title 18 CRS order to CBI is not only impractical but unwieldy given the numbers of people who are arrested for a crime. Law enforcement officers have no way to distinguish between a restraining order related to domestic violence and one that was issued against someone who was charged with littering.
- Title 18 CRS requires the order to be in effect from arraignment through termination from probation or release from incarceration. In order for the order to be vacated from the CBI terminal, the order needs to be vacated by the courts. Probation departments try to alert the courts when a person is terminated from probation to alert the clerks to vacate the restraining order. However, the court has no way of knowing when a person is released from jail or prison. Consequently, the courts either enter a vacate date that is arbitrary or there is no removal of the restraining order from the CBI registry.
- If title 18CRS orders are intended to be transferred to CBI and, in turn, transferred to the FBI’s protection order files, there will need to be some better identification of which orders should go to the FBI. In order to enter a restraining order in the FBI’s system, a defendant must have been provided with notice and an opportunity to be heard. In many of the courts, defendants are given a blanket verbal order stating that there is an order in effect pursuant to title 18 CRS. Te FBI is clear that a verbal order does not provide “actual notice” to the defendant and “actual notice” is required for the order to be a qualified order.

Recommendation:

- (1) Create a policy that identifies whether criminal orders should be transferred to CBI and, if so, clearly indicating the duration of the order. If the intent is to keep active the orders issued against individuals who are incarcerated, a policy and implementation strategy needs to be developed to provide CBI with the information needed to vacate orders upon

disposition of the case. (A draft policy was developed that could be used as a starting point.)

- (2) Cleanup language needs to be developed to address the legislative inconsistencies. Specifically, all the provisions that are specific to domestic violence should be categorized in a manner that makes it clear which provisions pertain only to domestic violence cases.
- (3) If criminal orders are appropriate for transfer to CBI and the FBI, a policy and training need to be developed to ensure defendants receive “actual notice” of the order and the opportunity to be heard.

Concerning Technology Issues:

There are a number of technology issues that need to be addressed to improve data transfer and enforceability. There are technology improvements necessary at the courts and at CBI to ensure transfer of orders to the federal protection order file.

Mandatory Data Fields and coding:

Problems:

- The federal Protection Order File requires additional fields on restraining orders in order to permit transfer from state registries to the federal registry. There are two fields that are not mandatory fields for transfer of the restraining order from the courts to CBI: race of defendant and sex of defendant.
- There are difficulties for some law enforcement to determine the specific provisions of the restraining orders. One reason is that some law enforcement are unable to read the comment fields that permit clerks to type text. The federal registry has numeric codes that correspond to specific prohibitions on the order, i.e. “no contact.”
- The Brady Indicator is a field contained in the Federal protection order registry that identifies those individuals who are restricted from firearm purchases, possession, transfer. The field alerts law enforcement, particularly those in other states, that the restraining order is one fits the restrictions.
- Currently, there is a case type associated with domestic abuse restraining order cases. Use of the case type is inconsistent. In FY 01 domestic abuse restraining order accounted for 65% of new filings in the county courts. In looking at all active restraining orders by case type, domestic abuse coded orders ranged from 0% in some jurisdictions to more than 70% in other jurisdictions.

Recommendation:

The fields identifying race and sex already exist and often are used when the information is available. The fields, however, are not necessary permitting restraining orders to transfer from the courts to CBI without information. The fields should be mandatory on all restraining orders.

Add fields, or instruct clerks to use the comment field to include numeric codes that correspond to prohibitions on the order. The comment field could also be used to identify the order as one that carries the firearm restrictions.

Whatever recommendation is adopted, training for law enforcement, clerks and judges will be paramount to effective implementation.

Concerning Policy and Training

There are some inconsistencies in practice across the state that create problems for people affected by restraining orders. Training needs to occur.

Drafting/crafting orders:

Problems:

- In writing crafting orders, many judges add language to the forms to accommodate certain issues specific to the families involved in the case. Often the language adopted effectively renders the order unenforceable because law enforcement cannot understand the provisions.
- Judges often craft orders with language that permits a defendant to carry/possess a firearm in violation of federal law.

Recommendation:

Offer a restraining order drafting training for judges at both judicial training events.

Victim Standing:

Problem:

- In many cases in which a mandatory criminal restraining order is issued, victims attempt to request the order to be vacated, but victims have no standing to bring the case in front of the court.

Recommendation:

Determine the frequency of requests for vacating the “no contact” provisions of the criminal orders to determine if a recommendation should be made to remove the “no contact” provision from the statute. If the provision remains, training needs to occur with district attorneys offices and victim services professionals to ensure that the advocates and prosecutors advise the victim that modification of the order needs to be brought through a motion by the district attorney.

Forms

Due to statutory requirements, forms are standardized statewide. The forms will need to be changed to address any of the changes noted above. There are some specific changes that have already been identified.

Language to complement federal prosecution:

Problem:

- In order for the U.S. Attorney’s Office to prosecute cases that involve unlawful firearms possession and transfer in violation of the Brady Bill or in violation of the other federal provisions, the state restraining orders need to show that a specific finding was made that is consistent with federal law. The findings need to be outlined on the forms and need to include the following: that the defendant had notice and

opportunity to be heard, whether the order is one issued in the context of an intimate relationship, the defendant represents a credible threat, and the prohibited behavior.

Recommendation:

Include language on the state forms that is consistent with the language needed for federal prosecution.