

Surrender, Search & Seizure, and Return of Firearms

PROTOCOLS AND BEST PRACTICES FOR COURTS
NYS Unified Court System (rev. 10/30/2020)

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A. INTRODUCTION

Firearms surrender is frequently ordered in both criminal and family court orders of protection and is a required provision in certain circumstances. Ensuring compliance with surrender provisions is critical and necessitates clear and consistent protocols in partnership with other local stakeholders. Recent legislative amendments have authorized both criminal and family courts to issue search and seizure orders for willful non-compliance with firearms surrender directives [see CPL 530.14 and FCA 842-a]. Additionally, the legislation defines procedures for licensing officers to return seized firearms to suspects/arrestees in reported family offenses [see CPL 140.10(6)] and for criminal courts of record to return surrendered or seized firearms to criminal defendants and family court respondents subject to orders of protection in which the surrender provision has been terminated [see CPL 530.14(5)]. These new legislative provisions require enhanced protocols and even greater stakeholder coordination. The following guide addresses recommended operational protocols and best practices for firearms surrender, search & seizure and return as well as an overview of the applicable statutes.

The legislation discussed herein did not amend the Domestic Relations Law or otherwise address the Supreme Courts' statutory authority in a matrimonial action to issue search and seizure orders regarding firearms possessed in violation of an order of protection issued thereunder. Specifically, the Legislature did not add the new search and seizure provisions to sections 240(3)(h) and 252(9) of the Domestic Relations Law, which incorporate by reference the firearms surrender and license suspension and revocation requirements of CPL § 530.14 and Family Court Act §§ 842-a and 846-a. Notwithstanding, in both plenary and consolidated matrimonial proceedings, the Supreme Court, as a court of general original jurisdiction in law and equity, retains inherent authority to issue such orders outside of the framework and protocols laid out below and may do so where necessary and proper to ensure compliance with its order and the safety of protected parties.

NOTE: *The authors wish to gratefully acknowledge Sheila Schwanekamp of the 8th Judicial District for sharing her excellent firearms surrender protocols document with us. Much of which has served as the basis for the content of this guide.*

B. STAKEHOLDER PLANNING AND ENGAGEMENT

- I. Administrative or Supervising Judges should establish detailed protocols and clearly-defined expectations with local domestic violence stakeholders (i.e., prosecutor, county attorney, defense bar, law enforcement, victim advocates, etc.) regarding:
 - a. Eliciting firearms possession information before issuance of an order of protection in criminal or family court proceedings
 - b. Transmission of orders of protection to local law enforcement
 - c. Firearms surrender procedures
 - d. Issuance of search and seizure orders pursuant to CPL 530.14 and FCA 824-a and in compliance with CPL article 690
 - e. Transmission of search and seizure orders to local law enforcement
 - f. Compliance with and monitoring of surrender and search & seizure directives
 - g. Firearms return procedures in criminal courts of record

C. COURT PROCESS FOR SURRENDER AND SEARCH & SEIZURE OF FIREARMS

I. CRIMINAL ARRAIGNMENT

When issuing a temporary order of protection, the Court shall:

- a. Review the accusatory instrument regarding defendant's possible firearms possession.
- b. Review the Domestic Incident Report (DIR) for information regarding defendant's possible

firearms possession.

- c. Review the criminal history report to ascertain if the defendant has applied for a firearms license
- d. Search the order of protection registry for existing OPs or TOPs that have a state firearms prohibitor
- e. Search the order of protection registry for existing extreme risk protection orders
- f. The court should ask the parties if there is any further information they wish to convey regarding the defendant's possession of firearms

II. FAMILY COURT FIRST APPEARANCE OR CRIMINAL COURT ISSUANCE OF FAMILY COURT TOP PURSUANT TO EMERGENCY POWERS

- a. Review petition
- b. Search the order of protection registry for existing OPs or TOPs that have a state firearms prohibitor
- c. Search the order of protection registry for existing extreme risk protection orders
- d. Review any prior Family Court matters
- e. Inquire with petitioner if there is any further information they wish to convey regarding the respondent's possession of firearms

III. ISSUANCE OF TOP or OP

- a. Following inquiry regarding possession of firearms, the Court shall indicate:
 - i. Each specified firearm with a description (if possible)
 - ii. A general statement directing immediate surrender of any other firearms possessed
 - iii. The law enforcement agency to which firearms must be surrendered
 - iv. The location where the firearms must be surrendered

***NOTE:** By statute, the law enforcement agency designated to receive surrendered weapons must provide the defendant/respondent with a receipt for all surrendered firearms and must provide notice of the surrender with an inventory of surrendered weapons to the Court. If such notification protocols are either not established or not followed in your jurisdiction, it is imperative that a protocol is implemented in partnership with local law enforcement agencies. The Court should also consider establishing a "compliance review" calendar to monitor compliance with firearms surrender directives.*

- b. The court clerk must transmit the TOP/OP to the law enforcement agency designated to receive surrendered firearms [CPL 530.14 (6)(b)]. A transmission protocol must be established between the Court and the law enforcement agency (e.g., email, fax, hand-delivery, etc.).
- c. The TOP/OP must be issued either via UCMS or WebDVS, which transmits it to the Order of Protection Registry and notifies both DCJS and NYSP of the order's issuance as required under CPL 530.14(6)(c) and FCA 842-a.

IV. SURRENDER OF FIREARMS TO LAW ENFORCEMENT

After the Court orders the surrender of all firearms and the suspension of existing licenses pursuant to PL sections 265.20(a)(1)(f) and 400.05(6):

- a. Defendant/respondent must surrender the firearms to the designated law enforcement agency.
- b. Designated law enforcement agency must issue a receipt to the surrendering party for any

firearms surrendered.

- c. The designated law enforcement agency must store all surrendered firearms in accordance with agency policy and may dispose of firearms in accordance with CPL 400.05(6).
- d. The designated law enforcement agency must provide the Court with immediate notice of the surrender and an inventory of surrendered weapons [*see attached* form REP-1].

V. FAILURE TO SURRENDER FIREARMS

When a defendant/respondent willfully fails to surrender firearms, the TOP/OP violation may be addressed as follows:

- a. The prosecutor may:
 - i. Request issuance of a search and seizure order
 - ii. Request a more restrictive securing order in a criminal matter
 - iii. File a Criminal Contempt 2° [PL 215.50 (3)] charge
- b. The Court may:
 - i. Modify the securing order in a criminal matter
 - ii. Hold the defendant/respondent in contempt for resistance or willful disobedience to the Court's lawful mandate pursuant to Judiciary Law section 750
 - iii. Issue a search and seizure order pursuant to CPL 530.14 (1)(c), (2)(c) or (3)(c) or FCA 842-a, as applicable, and in accordance with the provisions of CPL article 690 including a finding of reasonable cause:
 - Designating a law enforcement agency to conduct a search and seizure of firearms
 - Specifying the person, premises or vehicles to be searched

D. SEIZURE OF FIREARMS FOR FAMILY OFFENSES WITHOUT A COURT ORDER

I. ARREST WITHOUT A WARRANT BY POLICE OFFICER [CPL 140.10(6)]

- a. When responding to a family offense [CPL 530.11], police shall seize any weapon that is in plain sight or found by a lawful search and shall seize any accompanying license.
- b. Unless there is a pending criminal charge, order of protection, ERPO, or other court order prohibiting possession of the weapon, the weapon and license (if any) must be returned to the suspect/arrestee after 48 hours upon a written finding by the appropriate licensing authority that there is no other legal impediment to possessing it.

NOTE: *An application form (RET-3/A) and a boilerplate order form (RET-3) have been created for this purpose.*

- i. Procedure to return seized firearms to a suspect/arrestee after arrest without warrant:
 - a) The suspect/arrestee must:
 - i. File an application (RET-3/A) with the appropriate licensing authority
 - ii. Establish that more than 48 hours has elapsed since the seizure
 - iii. Establish that there is not a pending:
 - Criminal Charge
NOTE: *The licensing authority should perform an eJustice criminal history search to determine if the applicant has a pending criminal charge.*
 - Order of Protection
NOTE: *The licensing authority should perform an Order of Protection Registry search to determine if the applicant has a pending order of protection.*
 - Extreme Risk Protection Order [ERPO]

NOTE: *The licensing authority should perform an Order of Protection Registry search to determine if the applicant has a pending extreme risk protection order.*

- Other court order prohibiting possession of the weapon
- iv. Establish that:
 - They are the legal owner of the weapon
 - There is no other legal impediment to their possession of the weapon
- b) The licensing officer must issue a written order (RET-3) either:
 - i. Granting the application upon a finding that the applicant is the legal owner and there is no legal impediment to possessing the weapon
 - ii. Denying the application upon a finding that the applicant is not the legal owner or there is a legal impediment to possessing the weapon
- c. If another person demonstrates legal ownership of the weapon, the weapon must be returned upon a written finding by the appropriate licensing authority that there is no other legal impediment to possessing it.

NOTE: *An application form (RET-4/A) and a boilerplate order form (RET-4) have been created for this purpose.*

- i. Procedure to return seized weapons to a lawful owner other than the suspect/arrestee after an arrest without a warrant:
 - a) The lawful owner must:
 - i. File an application (RET-4/A) with the appropriate licensing authority
 - ii. Establish that:
 - They are the legal owner of the weapon
 - There is no other legal impediment to their possession of the weapon
 - b) The licensing officer must issue a written order (RET-4) either:
 - i. Granting the application upon a finding that the applicant is the legal owner and there is no legal impediment to possessing the weapon
 - ii. Denying the application upon a finding that the applicant is not the legal owner or there is a legal impediment to possessing the weapon

E. ORDERS OF PROTECTION

I. FIREARMS SURRENDER FOR TEMPORARY ORDER OF PROTECTION [CPL 530.14 (1) and FCA 842-a]

Revocation of license/surrender of firearms is mandatory when:

- a) A temporary order of protection is issued pursuant to CPL 530.12 (1) or 530.13 (1), or the Family Court Act, or DRL 240 or 252, and the Court has “good cause to believe” that the defendant has:
 - i. A prior violent felony conviction [PL 70.02]; or
 - ii. Willfully disobeyed a prior order of protection that involved:
 - Infliction of physical injury [PL 10.00 (9)]; or
 - Use or threatened use of a deadly weapon or dangerous instrument [PL 10.00 (12)(13)]; or
 - Behavior constituting a violent felony offense [PL 70.02]; or
 - iii. A previous conviction for:
 - Stalking 1° [PL 120.60]

- Stalking 2° [PL 120.55]
 - Stalking 3° [PL 120.50]
 - Stalking 4° [PL 120.45]; or
- b) Court finds a substantial risk that the defendant/respondent may use or threaten to use a firearm unlawfully against the protected party.

The Court shall then include the following provisions in the temporary order of protection:

1. Suspend any existing license to possess firearms; and
2. Order the defendant ineligible to obtain a firearms license; and
3. Order the immediate surrender of any and all firearms owned or possessed by the defendant, including:
 - a. A listing of each firearm with a description (if possible)
 - b. Law enforcement agency to which firearms must be surrendered
 - c. Location where the firearms must be surrendered

Best Practices:

- Ensure that the designated law enforcement agency provides notice of the surrender with an inventory of surrendered weapons to the Court.
***NOTE:** By statute, the law enforcement agency designated to receive surrendered weapons must provide the defendant with a receipt for all surrendered firearms and must provide notice of the surrender with an inventory of surrendered weapons to the Court. If such notification protocols are either not established or not followed in your jurisdiction, it is imperative that a protocol is implemented in partnership with local law enforcement agencies. [see attached form REP-1]*
- Establish a “compliance review” calendar to monitor compliance with firearms surrender directives.

Ex Parte Temporary Order of Protection

When issuing an ex parte temporary order of protection with a warrant, direct immediate firearms surrender upon service by law enforcement. Law enforcement must provide the defendant with a receipt for all surrendered firearms and must provide notice of the surrender with an inventory of surrendered weapons to the Court.

NOTE: Information regarding the defendant’s alleged possession of firearms may come from:

- Domestic Incident Report (DIR)
- Criminal History Report, which may show firearms license applications
- Victim/Complainant
- Victim advocate

Willful Refusal to Surrender Firearms [CPL 530.14(1)(c) and FCA 842-a]

When a defendant willfully refuses to surrender firearms as directed in a temporary order of protection issued for either a Family Offense or a Non-Family Offense, or for other good cause shown, the Court may issue a search and seizure order as follows:

NOTE: Firearms Search and Seizure Order (FSO-1) form has been promulgated for this purpose.

- The Court must:
 - In accordance with CPL 690.40(2), determine that the search and seizure order is supported by reasonable cause
 - Designate a law enforcement agency to conduct the search and seizure
 - Specify the person, premises or vehicles to be searched.
- The designated law enforcement agency must:

- Serve the order upon the defendant and execute the search.
- Perform the search in accordance with the provisions of CPL article 690.
- Seize any weapons and licenses in plain sight or discovered by the search.
- Issue an itemized receipt of the seized property to the defendant or other person in possession of the property.
- File a written inventory of the seized property with the Court.
- A Court of criminal jurisdiction may also issue a more restrictive securing order if it determines that either release with non-monetary conditions, monetary bail or remand without bail is the least restrictive means of ensuring defendant's compliance with court conditions based upon the violation of the TOP.

II. FIREARMS SURRENDER FOR FINAL ORDER OF PROTECTION [CPL 530.14 (2) and FCA 842-a]

Revocation of license/surrender of firearms is mandatory when:

- a) A final order of protection is issued pursuant to CPL 530.12 (5) or 530.13 (4), or the Family Court Act, or DRL 240 or 252, and the defendant/respondent is convicted of a:
 - i. felony; or
 - ii. serious offense as defined in PL 265.00 (17); or
- b) Court finds a substantial risk that the defendant/respondent may use or threaten to use a firearm unlawfully against the protected party.

The Court shall then include the following provisions in the final order of protection:

1. Suspend any existing license to possess firearms; and
2. Order the defendant/respondent ineligible to obtain a firearms license; and
3. Order the immediate surrender of any and all firearms owned or possessed by the defendant/respondent, including:
 - a. A listing of each firearm with a description (if possible)
 - b. The law enforcement agency to which firearms must be surrendered
 - c. The location where the firearms must be surrendered

Best Practices:

- Ensure that the designated law enforcement agency provides notice of the surrender with an inventory of surrendered weapons to the Court.
***NOTE:** By statute, the law enforcement agency designated to receive surrendered weapons must provide the defendant/respondent with a receipt for all surrendered firearms and must provide notice of the surrender with an inventory of surrendered weapons to the Court. If such notification protocols are either not established or not followed in your jurisdiction, it is imperative that a protocol is implemented in partnership with local law enforcement agencies. [see attached form REP-1]*
- Establish a "compliance review" calendar to monitor compliance with firearms surrender directives.

Ex Parte Final Order of Protection

When issuing an ex parte final order of protection with a warrant, direct immediate firearms surrender upon service by law enforcement. Law enforcement must provide the defendant/respondent with a receipt for all surrendered firearms and must provide notice of the surrender with an inventory of surrendered weapons to the Court.

***NOTE:** Information regarding the defendant/respondent's alleged possession of firearms may come from:*

- *Domestic Incident Report (DIR)*

- *Criminal History Report, which may show firearms license applications*
- *Victim/Complainant*
- *Victim advocate*

Willful Refusal to Surrender Firearms [CPL 530.14(2)(c) and FCA 842-a]

When a defendant/respondent willfully refuses to surrender firearms as directed in a final order of protection issued for either a Family Offense or a Non-Family Offense, or for other good cause shown, the Court may issue a search and seizure order as follows:

NOTE: *Firearms Search and Seizure Order (FSO-1) form has been promulgated for this purpose.*

- The Court must:
 - In accordance with CPL 690.40(2), determine that the search and seizure order is supported by reasonable cause
 - Designate a law enforcement agency to conduct the search and seizure
 - Specify the person, premises or vehicles to be searched.
- The designated law enforcement agency must:
 - Serve the order upon the defendant/respondent and execute the search.
 - Perform the search in accordance with the provisions of CPL article 690.
 - Seize any weapons and licenses in plain sight or discovered by the search.
 - Issue an itemized receipt of the seized property to the defendant/respondent or other person in possession of the property.
 - File a written inventory of the seized property with the Court.
- A Court of criminal jurisdiction may also issue a more restrictive securing order if it determines that either release with non-monetary conditions, monetary bail or remand without bail is the least restrictive means of ensuring defendant’s compliance with court conditions based upon the violation of the OP.

III. WILLFUL FAILURE TO OBEY AN ORDER OF PROTECTION [CPL 530.14 (3) and FCA 842-a]

The Court shall revoke firearms licenses and order surrender of firearms when the Court finds:

- a) Pursuant to CPL 530.12 (11) or 530.13 (8) or the Family Court Act the defendant/respondent willfully violated an order of protection, and the violation involved:
 - i. Inflicting physical injury as defined in PL 10.00 (9); or
 - ii. Use or threat to use a deadly weapon or dangerous instrument as defined in PL 10.00 (12) (13); or
 - iii. Behavior constituting a violent felony offense as defined in PL 70.02; or
- b) Substantial risk that the defendant/respondent may use or threaten to use a firearm unlawfully against the protected party.

The Court shall then include the following provisions in the final order of protection:

1. Suspend any existing license to possess firearms; and
2. Order the defendant/respondent ineligible to obtain a firearms license; and
3. Order the immediate surrender of any and all firearms owned or possessed by the defendant/respondent, including:
 - a. A listing of each firearm with a description (if possible)
 - b. The law enforcement agency to which firearms must be surrendered
 - c. The location where the firearms must be surrendered

Best Practices:

- Ensure that the designated law enforcement agency provides notice of the surrender

with an inventory of surrendered weapons to the Court.

NOTE: *By statute, the law enforcement agency designated to receive surrendered weapons must provide the defendant/respondent with a receipt for all surrendered firearms and must provide notice of the surrender with an inventory of surrendered weapons to the Court. If such notification protocols are either not established or not followed in your jurisdiction, it is imperative that a protocol is implemented in partnership with local law enforcement agencies. [see attached form REP-1]*

- Establish a “compliance review” calendar to monitor compliance with firearms surrender directives.

Willful Refusal to Surrender Firearms [CPL 530.14(3)(c) and FCA 842-a]

When a defendant/respondent willfully refuses to surrender firearms as directed in a criminal order of protection issued for either a Family Offense or a Non-Family Offense, or for other good cause shown, the Court may issue a search and seizure order as follows:

NOTE: *Firearms Search and Seizure Order (FSO-1) form has been promulgated for this purpose.*

- The Court must:
 - In accordance with CPL 690.40(2), determine that the search and seizure order is supported by reasonable cause
 - Designate a law enforcement agency to conduct the search and seizure
 - Specify the person, premises or vehicles to be searched.
- The designated law enforcement agency must:
 - Serve the order upon the defendant/respondent and execute the search.
 - Perform the search in accordance with the provisions of CPL article 690.
 - Seize any firearms and licenses in plain sight or discovered by the search.
 - Issue an itemized receipt of the seized property to the defendant/respondent or other person in possession of the property.
 - File a written inventory of the seized property with the Court.
- A Court of criminal jurisdiction may also issue a more restrictive securing order if it determines that either release with non-monetary conditions, monetary bail or remand without bail is the least restrictive means of ensuring defendant’s compliance with court conditions based upon the violation of the TOP/OP.

IV. HEARING REGARDING SUSPENSION, SURRENDER, SEARCH AND SEIZURE [CPL 530.14 (7) and FCA 842-a]

- a. Defendant/respondent may request and has a right to a hearing regarding revocation, suspension, ineligibility, surrender or seizure order.
- b. Court must provide notice and an opportunity to be heard to:
 - i. Prosecutor
 - ii. Protected party
 - iii. Every licensing officer/bureau that has issued a firearms licenses to the defendant/respondent
- c. The Court may issue the order before a hearing.
- d. If issued before a requested hearing, the Court must commence the hearing within 14 days of issuance.

V. DEFENDANT/RESPONDENT APPLICATION TO RETURN FIREARMS SURRENDERED/SEIZED PURSUANT TO ORDER OF PROTECTION [CPL 530.14(5)(b)]

When the firearms surrender provision is terminated in either a criminal or a Family Court order

of protection, the defendant/respondent MAY apply to have surrendered or seized firearms returned as follows:

NOTE: An application form (RET-1/A) and a boilerplate order form (RET-1) have been created for this purpose.

- a) The defendant or respondent must:
 - i. File a written application (RET-1/A) with any court of record of criminal jurisdiction (includes City, District, NYC Criminal, County and Supreme Courts, but excludes Town & Village Courts)
 - ii. Provide notice and an opportunity to be heard to the:
 1. Prosecutor
 2. County Attorney
 3. Protected party
 4. Every licensing officer/bureau that issued a firearms license to the subject
 - iii. Establish that there is not a pending:
 1. Criminal Charge
NOTE: The court should perform an eJustice criminal history search to determine if the applicant has a pending criminal charge.
 2. Order of Protection
NOTE: The court should perform an Order of Protection Registry search to determine if the applicant has a pending order of protection.
 3. Extreme Risk Protection Order [ERPO]
NOTE: The court should perform an Order of Protection Registry search to determine if the applicant has a pending extreme risk protection order.
 4. Other court order prohibiting possession of the firearm
NOTE: If the criminal court requires additional information from the family court, 22 NYCRR 205.5(e) provides for access to this information.
 - iv. Establish that:
 1. They are the legal owner of the firearm
 2. There is no other legal impediment to their possession of the firearm
- b) The Court must issue a written order (RET-1) either:
 - i. Granting the application upon a finding that the applicant is the legal owner and there is no legal impediment to possessing the firearm
NOTE: If informed by a licensing officer/bureau that revocation proceedings will be commenced against the applicant, the Court may stay an order returning firearms to a defendant/respondent pending the conclusion of the revocation proceedings.
 - ii. Denying the application upon a finding that the applicant is not the legal owner or there is a legal impediment to possessing the firearm

VI. **LAWFUL OWNER APPLICATION TO RETURN FIREARMS SURRENDERED/SEIZED PURSUANT TO ORDER OF PROTECTION [CPL 530.14(5)(d) and FCA 842-a]**

When firearms are surrendered or seized pursuant to a criminal or a Family Court order of protection or search and seizure order, and the firearms are lawfully owned by someone other than the defendant/respondent, the lawful owner MAY apply to have surrendered or seized firearms returned as follows:

NOTE: An application form (RET-2/A) and a boilerplate order form (RET-2) have been created for this purpose.

- a) The lawful owner must:
 - i. File a written application (RET-2/A) with any court of record of criminal jurisdiction (includes City, District, NYC Criminal, County and Supreme Courts, but excludes Town & Village and Family Courts)
 - ii. Establish that:
 1. They are the legal owner of the firearm
 2. There is no other legal impediment to their possession of the firearm
- b) The Court must issue a written order (RET-2) either:
 - i. Granting the application upon a finding that the applicant is the legal owner and there is no legal impediment to possessing the firearm
 - ii. Denying the application upon a finding that the applicant is not the legal owner or there is a legal impediment to possessing the firearm

F. STATE AND FEDERAL STATUTORY FIREARMS PROVISIONS

I. MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE [CPL 370.15]

- a. When a defendant is charged with a misdemeanor crime of domestic violence (MCDV), the prosecutor must file a Family Protection Registry Information Sheet and Notices pursuant to CPL 170.10(8-a)(a) and 370.15. This establishes a system to convey information to federal authorities. Thus, when a defendant is convicted of a domestic violence related misdemeanor, which is a firearms prohibitor, the court clerk electronically reports the conviction to the Division of Criminal Justice Services (DCJS). DCJS then electronically reports the conviction to federal authorities for inclusion in the National Instant Criminal Background Check System (NICS).
- b. The statute applies to convictions for the commission of or an attempt to commit the following misdemeanors:
 - Assault in the Third Degree [PL 120.00]
 - Menacing in the Third Degree [PL 120.15]
 - Menacing in the Second Degree [PL 120.14]
 - Criminal Obstruction of Breathing or Blood Circulation [PL 121.11]
 - Unlawful Imprisonment in the Second Degree [PL § 135.05]
 - Coercion in the Third Degree [PL 135.60]
 - Criminal Tampering in the Third Degree [PL 145.14]
 - Criminal Contempt in the Second Degree [PL 215.50]
 - Harassment in the First Degree [PL 240.25]
 - Aggravated Harassment in the Second Degree [PL 240.30]
 - Criminal Trespass in the Third Degree [PL 140.10]
 - Criminal Trespass in the Second Degree [PL 140.15]
 - Arson in the Fifth Degree [PL 150.01]
- c. When a defendant is charged with an MCDV committed against a member of the same family or household as defined in CPL 530.11 (1), the prosecutor MUST serve an MCDV allegation notice upon the defendant and file it with the Court within 45 days after arraignment. MCDV notice must include the victim's name and the nature of the relationship.
- d. Upon conviction, the defendant is entitled to a hearing on the MCDV allegation as well as an adjournment of sentencing to prepare for the hearing. At the hearing, the prosecutor must prove beyond a reasonable doubt that the defendant is related to the victim as defined in

CPL 530.11 (1). The Court may consider reliable hearsay evidence submitted by either party if it is relevant, and facts proven at trial or admitted during a plea allocution are deemed established beyond a reasonable doubt and shall not be relitigated. Alternatively, the defendant may admit to the relationship by stipulation. After hearing or admission, as applicable, the Court must issue a written determination. The relationship is established if the allegation is sustained or admitted, and the determination and conviction are reported to DCJS and NICS.

- e. In addition to the state law, the Federal firearms provisions are as follows:
 - i. 18 U.S.C. sec. 922 (g) (8) makes it a federal crime for a person who is subject to a “qualifying protection order” to possess a firearm or ammunition, or to ship or receive a firearm or ammunition in interstate or foreign commerce.
 - ii. To qualify under sec 922 (g)(8), a protection order must:
 - 1. Issue after a hearing where the respondent was on notice and had an opportunity to participate;
 - 2. Restrain the respondent from harassing, stalking, or threatening an intimate partner, or child of the intimate partner or respondent, or engaging in conduct that would place an intimate partner in reasonable fear of bodily injury to self or child;
 - 3. Include a finding that either the respondent represents a credible threat to the physical safety of an intimate partner or child, or a term explicitly prohibiting the use, attempted use, or threatened use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury.
 - iii. 18 U.S.C. sec. 922 (g)(9) of the Federal Gun Control Act of 1996 prohibits the possession of firearms if convicted of an MCDV, making it unlawful to ship, transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearms or ammunition which has been thus shipped or transported.
 - iv. An MCDV is defined as a charge with an element of use or attempted use of physical force or threatened use of a deadly weapon.
 - v. An MCDV conviction means an offense where the defendant was:
 - 1. Represented by counsel or knowingly and intelligently waived the right to counsel; and
 - 2. Entitled to a jury trial and was either tried by a jury or waived a jury trial by pleading guilty.
 - vi. The federal firearms provisions are referenced in UCS OP forms but are not self-executing.

II. BEST PRACTICES

- a) The Court should direct the immediate surrender of firearms and ammunition and advise defendants of 1) the federal firearms provisions, and 2) that they are subject to both criminal contempt charges and federal prosecution for failure to comply when:
 - i. Issuing a temporary or final order of protection pursuant to CPL 530.12 that includes the “[02] non-offensive conduct” provision, explicitly prohibiting the use, attempted use, or threatened use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury; or
 - ii. The defendant is convicted of an MCDV as defined in CPL 370.15.
- b) As part of the surrender provision, the Court should indicate:
 - i. Each specified firearm with a description (if possible)
 - ii. A general statement directing immediate surrender of any other firearms possessed

- iii. The law enforcement agency to which firearms must be surrendered
- iv. The location where the firearms must be surrendered

NOTE: *By statute, the law enforcement agency designated to receive surrendered weapons must provide the defendant with a receipt for all surrendered firearms and must provide notice of the surrender with an inventory of surrendered weapons to the Court. If such notification protocols are either not established or not followed in your jurisdiction, it is imperative that a protocol is implemented in partnership with local law enforcement agencies. The Court should also consider establishing a “compliance review” calendar to monitor compliance with firearms surrender directives.*

