

JUDGES GUIDE TO

Domestic Violence Cases

FIREARMS AND FULL FAITH AND CREDIT

[REVISED 2014]



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

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INTRODUCTORY NOTE

Firearms and Full Faith and Credit, although two separate topics, have been combined into one bench handbook because of space considerations. Chapters 1 and 2 deal with Firearms, and Chapter 3 deals with Full Faith and Credit.

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FIREARMS—OVERVIEW

The primary objective of Chapters 1 and 2 is to provide California judicial officers with a comprehensive reference guide to firearms prohibitions that impact domestic violence, sexual assault, and stalking cases. These chapters examine federal statutory prohibitions and California statutory prohibitions. Relevant sections examine the restrictions, any exemptions, and relief from the prohibitions.

The chapters cover the effect of federal law on state law, federal and California definitions, federal and California restrictions resulting from felony and misdemeanor convictions, California statutory restrictions applicable to juveniles and probationers, federal and California restrictions resulting from mental health proceedings, federal and California seizure and forfeiture procedures, and federal and California statutory restrictions applicable to protective orders. Appendix A contains a summary chart of federal and California restrictions, Appendix B contains Alcohol, Tobacco, and Firearms information sheets and other resource materials, Appendix C contains a relevant article, and Appendix D contains Department of Justice forms and a Judge's Firearms Checklist.

FIREARMS—EFFECT OF FEDERAL LAW ON STATE LAW

The federal firearms provisions in 18 USC ch 44 do not preempt California law when California statutes are consistent with federal statutes, unless there is a direct and positive conflict between the federal provision and the state law so that the two cannot be reconciled or consistently stand together. 18 USC §927.

Note: The federal firearms laws and California law coexist, and both are applied to each situation. For example, a law enforcement officer may be exempt from certain federal firearms prohibitions and thus not subject to federal enforcement; however, that same law enforcement officer may be subject to prohibition under state law and thus subject to state enforcement. The applicability of 18 USC ch 44 is determined by the federal requirements listed within the code sections and not by state law.

Helmer v Miller (1993) 19 CA4th 1565, 1572, 25 CR2d 8: Penal Code §29800(a) (formerly Pen C §12021(a)) is not preempted by federal law. The regulation of the possession of firearms by felons is within the historic police powers of the states. Congress did not intend to preempt such authority, but rather to augment state law dealing with firearm possession.

If any of the federal provisions in 18 USC ch 44 are held invalid against a person or circumstance, the remainder of the chapter and the application of the provision to other persons not similarly situated or to other circumstances is not affected. 18 USC §928.

The federal firearms prohibitions, contained in 18 USC ch 44, apply to any firearms or ammunition that at any time were shipped or transported in interstate or foreign commerce, and are punishable under 18 USC §924(b).

FIREARMS—DEFINITIONS

Federal

The term “firearm” means (A) any weapon (including a starter gun) that will or is designed to convert or readily may be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. The term does not include an antique firearm. 18 USC §921(a)(3).

A “destructive device” means:

- Any explosive, incendiary, or poison gas. 18 USC §921(a)(4)(A).
- Any type of weapon, other than a shotgun or shotgun shell, that the Attorney General of the United States finds is generally recognized as suitable for sporting purposes, by whatever name known that will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant and that has a barrel with a bore of more than one-half inch in diameter. 18 USC §921(a)(4)(B).
- Any combination of parts either designed or intended for use in converting any device into any destructive device described above and from which a destructive device can be readily assembled. 18 USC §921(a)(4)(C).

The terms “firearm silencer” and “firearm muffler” mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication. 18 USC §921(a)(24).

The term “ammunition” means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm. 18 USC §921(a)(17)(A).

California

A “pistol,” “revolver,” and “firearm capable of being concealed on the person” is defined as any device designed to be used as a weapon, and from which is expelled a projectile by the force of any explosion, or other form of combustion, and has a barrel less than 16 inches in length. The terms also apply to a 16-inch or longer barrel that is designed to be interchanged with the 16 inches or less barrel. Pen C §16530(a).

“Handgun” means any pistol, revolver, or firearm capable of being concealed on the person. Pen C §16640(a).

“Firearm” means any device designed to be used as a weapon, and from which is expelled a projectile by the force of any explosion or other form of combustion. Pen C §16520(a). The term “firearm” includes the frame or receiver of the weapon. Pen C §16520(b).

For purposes of Pen C §§25400, 26500, 27500–27590, 28100, 29610–29750, 29800–29905, 31615, and any provision listed in Pen C §16585(a), and Welf & I C §§8100, 8101, 8103, notwithstanding the use of the term “any firearms” in those sections, each firearm or the frame or receiver shall constitute a distinct and separate offense. Pen C §23510.

Chapter 1

CRIMINAL FIREARMS LAWS

I. FELONY CONVICTIONS

- A. [§1.1] Federal Restrictions
- B. [§1.2] Exemptions From Federal Restrictions
- C. [§1.3] Relief From Federal Disability
- D. [§1.4] California Restrictions
- E. [§1.5] Exemptions From California Restrictions

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- A. [§1.6] Federal Restrictions
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- C. [§1.8] Relief From Federal Disability
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- E. [§1.10] Exemptions From California Restrictions

III. [§1.11] CONDITION OF PROBATION—CALIFORNIA RESTRICTIONS

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V. MENTAL HEALTH

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 - 2. [§1.17] Psychotherapist Communication
 - 3. [§1.18] Adjudicated by Court
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 - 6. [§1.21] Mentally Incompetent to Stand Trial
 - 7. [§1.22] Conservatorship
 - 8. [§1.23] Involuntary Admittance (“5150”)
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VI. SEIZURE AND FORFEITURE

- A. [§1.25] Federal
- B. [§1.26] California

I. FELONY CONVICTIONS

[§1.1] FEDERAL RESTRICTIONS

Federal law prohibits selling or otherwise disposing of any firearms or ammunition to any person the transferor knows or reasonably should have known is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for more than one year. 18 USC §922(d)(1).

A knowing violation results in a fine, imprisonment for no more than ten years, or both. 18 USC §924(a)(2).

Federal law prohibits a person, who has been convicted in any court of a crime punishable by more than one year in prison, from transporting, possessing, or receiving any firearm or ammunition. 18 USC §922(g)(1).

Note: Small v U.S. (2005) 544 US 385, 125 S Ct 1752, 161 L Ed 2d 651 (18 USC §922(g)(1)'s phrase "convicted in any court" encompasses only domestic, not foreign, convictions).

A knowing violation results in a fine, imprisonment for not more than 10 years, or both. 18 USC §924(a)(2).

A person who violates 18 USC §922(g) and has three previous convictions by any court for a violent felony or serious drug offense or both, committed on occasions different from one another, is subject to a fine and imprisonment for not less than 15 years. As to the conviction under 18 USC §922(g), the court cannot suspend the sentence or grant a probationary sentence. 18 USC §924(e)(1).

A "violent felony" means any crime punishable by more than one year in prison or an act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be subject to imprisonment for more than one year if committed by an adult and includes the following elements (18 USC §924(e)(2)(B)):

- The use, attempted use, or threatened use of physical force against another; or
- Burglary, arson, or extortion; involves the use of explosives; or otherwise involves conduct that poses a serious potential risk of physical injury to another.

The term "conviction" includes an act of juvenile delinquency involving a violent felony. 18 USC §924(e)(2)(C).

Federal law prohibits a person, under indictment for a crime punishable by more than one year in prison, from shipping or transporting in interstate or foreign commerce or receiving from interstate or foreign commerce any firearm or ammunition. 18 USC §922(n).

A willful violation is subject to a fine, imprisonment no longer than five years, or both. 18 USC §924(a)(1)(D).

Note: A crime punishable by more than one year in prison does not include (1) federal or state offenses related to the regulation of some business practices, or (2) any state offenses classified by state law as a misdemeanor and punishable by imprisonment for two years or less. The laws of the jurisdiction in which the proceeding was held determine what constitutes a conviction. A conviction that has been expunged, set aside, or in which the person has been pardoned or has his or her civil rights restored is not considered a “conviction” under the federal law unless the pardon, expungement, or restoration of civil rights expressly provides that the person cannot ship, transport, possess, or receive firearms. 18 USC §921(a)(20)(A)–(B).

The choice-of-law clause applies to the exemption clause. *Beecham v U.S.* (1994) 511 US 368, 374, 114 S Ct 1669, 128 L Ed 2d 383 (a state’s restoration of convicted felon’s civil rights does not remove disability of firearm possession imposed by federal law as a result of a federal conviction).

A. [§1.2] EXEMPTIONS FROM FEDERAL RESTRICTIONS

The federal firearms restrictions discussed in §1.1 do not apply to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of the United States or any department or agency thereof or any state or any department, agency, or political subdivision thereof. 18 USC §925(a)(1).

Note: Although armed forces personnel and law enforcement officers fall within this federal exemption, they may still be subject to state restrictions. Although this exemption applies when performing official duties that require a firearm, it does not extend to the use of personal firearms.

B. [§1.3] RELIEF FROM FEDERAL DISABILITY

A person who is subject to the restrictions of 18 USC §922(g)(1) may apply to the Attorney General for relief from the disabilities imposed by the federal laws. The Attorney General may grant such relief if he or she establishes to his or her satisfaction that the applicant is not likely to act in a manner dangerous to public safety based on the circumstances surrounding the disability and the applicant’s record and reputation, and granting the relief would not be contrary to the public interest. 18 USC §925(c).

A person who is denied relief by the Secretary can file a petition with the United States District Court for the district in which the person resides, requesting a judicial review of the decision. 18 USC §925(c).

Note: The relief from federal disability provision has been in the code since 1992. However, Congress has annually prohibited the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) from acting on individual applications for relief through restrictions in the ATF's appropriations.

C. [§1.4] CALIFORNIA RESTRICTIONS

It is unlawful for any person who (1) has been convicted of a felony under the laws of the United States, the State of California, or any other state government or country; or (2) has been convicted of a Pen C §23515(a)–(b), (d) offense (offenses involving violent use of a firearm); or (3) is addicted to the use of any narcotic drug, to own, possess, or control any firearm. Pen C §29800(a)(1).

People v Shear (1999) 71 CA4th 278, 282, 83 CR2d 707 (Pen C §29800(a)(1), formerly Pen C §12021(a)(1), is satisfied if a defendant has been convicted of a felony under the law of any state, regardless of whether the offense would have been punishable as a felony in California. The full faith and credit clause did not bar defendant's prosecution in California for being a convicted felon in possession of a firearm, even assuming that the Arizona statute had restored defendant's right to carry a firearm in that state. The full faith and credit clause does not preclude California from carrying out its public policy of prohibiting convicted felons within its borders from possessing firearms merely because such individuals can lawfully possess firearms in Arizona).

Helmer v Miller (1993) 19 CA4th 1565, 1570–1571, 25 CR2d 8 (Pen C §29825(a), formerly Pen C §12021(a), does not deny due process and equal protection because state law provides for the restoration of civil and political rights that were lost as an incident of felony conviction; statute was not an ex post facto law because it applies only to events occurring after its effective date).

People v Mills (1992) 6 CA4th 1278, 1289, 8 CR2d 310 (applying the amended version of Pen C §29800(a), formerly Pen C §12021(a), to defendant did not violate constitutional ex post facto principles because defendant was being punished for conduct that occurred after the effective date of the amended statute).

The Pen C §29800(a) prohibition does not apply to felony convictions under the laws of the United States unless either of the following criteria is satisfied:

- Conviction of a like offense under California law can only result in felony punishment. Pen C §29800(c)(1).
- The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than \$1000, or received both punishments. Pen C §29800(c)(2).

If a defendant is subject to the Pen C §29800(a) prohibitions, at the time of sentencing the court must provide, on a form provided by the Department of Justice (DOJ), a notice to the defendant regarding the firearms prohibition and include a form to facilitate the transfer of firearms. Failure to provide the notice is not a defense to a violation of this section. Pen C §29810.

It is unlawful for any person who has been convicted of a felony or of a Pen C §23515 offense, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Welf & I C §707, to own, possess, or control any firearm. Pen C §29800(b).

A person cannot possess or control a firearm if he or she has a previous conviction for any of the following offenses (Pen C §§29900(a), 29905(a)–(b)):

- Murder or voluntary manslaughter.
- Mayhem.
- Rape.
- Sodomy by force, violence, duress, menace, or threat of great bodily harm.
- Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
- Lewd acts on a child under the age of 14 years.
- Any felony punishable by death or imprisonment in the state prison for life.
- Any other felony in which the defendant inflicts great bodily injury on any person other than an accomplice, that has been charged and proven, or any felony in which the defendant uses a firearm that has been charged and proven.
- Attempted murder.
- Assault with intent to commit rape or robbery.
- Assault with a deadly weapon or instrument on a peace officer.
- Assault by a life prisoner on a non-inmate.
- Assault with a deadly weapon by an inmate.
- Arson.
- Exploding a destructive device or any explosive with intent to injure.
- Exploding a destructive device or any explosive causing great bodily injury.
- Exploding a destructive device or any explosive with intent to murder.

- Robbery.
- Kidnapping.
- Taking of a hostage by an inmate of a state prison.
- Attempt to commit a felony punishable by death or imprisonment in the state prison for life.
- Any felony in which the defendant personally used a dangerous or deadly weapon.
- Escape from a state prison by use of force or violence.
- Assault with a deadly weapon or force likely to produce great bodily injury.
- Any felony violation of Pen C §186.22 (gangs).
- Any attempt to commit a listed crime other than assault.
- Any Pen C §23515 offense (offenses involving violent use of a firearm).
- Carjacking.
- Any Pen C §23515(c) offense if the person has two or more convictions for violating Pen C §417(a)(2) (drawing or exhibiting a firearm in threatening manner).

Note: The dismissal of an accusation, information, or conviction under Pen C §1170.9 does not authorize a defendant to own, possess, or have in his or her possession or control any firearm, or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6 of the Penal Code.

Note: The dismissal of an accusatory pleading under Pen C §1203.4(a) does not affect the finding of a previous conviction. Pen C §29900(a)(2).

Note: It is unlawful for any person previously convicted for an offense listed in Pen C §29905, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Welf & I C §707, to own, possess, or control any firearm. Pen C §29900(b)(1).

The minimum penalty for a Pen C §29900 violation is at least six months in county jail, except in unusual cases where the interests of justice would best be served by granting probation or suspended sentence without the jail requirement or with other conditions. If the interests of justice would best be served by the alternative disposition, the court must specify the circumstances on the record and enter them in the minutes. Pen C §29900(c).

D. [§1.5] EXEMPTIONS FROM CALIFORNIA RESTRICTIONS

A violation of Pen C §29800(a)–(b) is justifiable if all the following conditions are met:

- The person found the firearm or took the firearm from a person who was committing a crime against him or her. Pen C §29850(a)(1).
- The person possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency's disposition or to a licensed firearms dealer for transfer or storage under Section 29830. Pen C §29850(a)(2).
- If the firearm was transported to a law enforcement agency or licensed firearms dealer, it was transported in accordance with Pen C §25570(b). Pen C §29850(a)(3).
- If the firearm is being transported to a law enforcement agency or licensed firearms dealer, the person transporting the firearm has given prior notice to the law enforcement agency or licensed firearms dealer that he or she is transporting the firearm to the law enforcement agency or licensed firearms dealer for disposition. Pen C §29850(a)(4).

II. MISDEMEANOR CONVICTIONS

A. [§1.6] FEDERAL RESTRICTIONS

Federal law prohibits selling or otherwise disposing of any firearms or ammunition to any person the transferor knows or reasonably should have known was convicted of a misdemeanor crime of domestic violence in any court. 18 USC §922(d)(9).

A knowing violation results in a fine, imprisonment for not more than ten years, or both. 18 USC §924(a)(2).

Federal law prohibits a person, who has been convicted in any court of a misdemeanor crime of domestic violence, from transporting, possessing, or receiving any firearm or ammunition. 18 USC §922(g)(9).

A knowing violation results in a fine, imprisonment for not more than ten years, or both. 18 USC §924(a)(2).

A person who violates 18 USC §922(g) and has three previous convictions by any court for a violent felony or serious drug offense or both, committed on occasions different from one another, is subject to a fine and imprisonment for not less than 15 years. As to the conviction under 18 USC §922(g), the court cannot suspend the sentence or grant a probationary sentence. 18 USC §924(e)(1).

A “violent felony” means any crime punishable by more than one year in prison or an act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be subject to

imprisonment for more than one year if committed by an adult and includes the following elements (18 USC §924(e)(2)(B)):

- The use, attempted use, or threatened use of physical force against another; or
- Burglary, arson, or extortion; the use of explosives; or otherwise involves conduct that poses a serious potential risk of physical injury to another.

The term “conviction” includes an act of juvenile delinquency involving a violent felony. 18 USC §924(e)(2)(C).

A misdemeanor crime of domestic violence is an offense that (18 USC §921(a)(33)(A)(i)–(ii)):

- Is a misdemeanor under federal, state, or tribal law; and
- Has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim has a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

Note: For purposes of this federal law, a person is not considered convicted of a misdemeanor crime of domestic violence unless that person was (1) represented by counsel in the case or knowingly and intelligently waived his or her right to counsel; and (2) if the person was entitled to a jury trial in the jurisdiction where the case was tried, the person received a jury trial or knowingly and intelligently waived his or her right to a jury trial. 18 USC §921(a)(33)(B)(i). A conviction that has been expunged, set aside, or in which the person has been pardoned or has had his or her civil rights restored (if the loss of civil rights occurs in that particular jurisdiction for such an offense) is not considered a “conviction” under the federal law unless the pardon, expungement, or restoration of civil rights expressly provides that the person cannot ship, transport, possess, or receive firearms. 18 USC §921(a)(33)(B)(ii).

A misdemeanor domestic violence conviction does not divest the defendant of his or her core civil rights (such as the right to vote, the right to serve on a jury, or the right to hold public office). Thus, if state law restores a defendant’s right to possess a firearm, that restoration does not make the defendant eligible for the “civil rights restored” exception to the federal firearms prohibition for domestic violence misdemeanants. *U.S. v Chovan* (2013) 735 F3d 1127. Defendant was convicted of a misdemeanor crime of domestic violence in California. California’s firearms prohibition for misdemeanor domestic violence crimes ends 10 years after the

conviction. After 10 years had passed, defendant attempted to purchase a firearm. He was charged with violating the lifetime federal firearms prohibition. He argued that after the 10-year prohibition period had passed, his civil rights were restored. The court rejected that argument. Defendant also challenged the federal firearms prohibition as a violation of his rights under the Second Amendment to the U.S. Constitution. The court found that, applying the intermediate level of scrutiny, the lifetime federal firearms prohibition for domestic violence misdemeanants does not violate the Second Amendment of the U.S. Constitution because the prohibition, as applied to the defendant, is substantially related to an important governmental interest.

TIP: Postconviction—Ensure that criminal records include information necessary to show that conviction qualifies under 18 USC §922(g)(9) (include disposition information and parties' relationship).

Several cases have challenged the constitutionality of 18 USC §922(g)(9) and failed:

- *U.S. v Pfeifer* (2004) 371 F3d 430 (application of 18 USC §922(g)(9) to defendant who was convicted of predicate crime before its enactment did not violate Ex Post Facto Clause, did not violate Second Amendment, and 18 USC §922(g)(9) was not unconstitutionally vague).
- *U.S. v Lewis* (2001) 236 F3d 948. (18 USC §922(g)(9) does not violate equal protection clause, Second, Eighth, or Tenth Amendment, and Congress did not exceed its power under the commerce clause).
- *U.S. v Thomson* (2001) 134 F Supp 2d 1227 (there was no ex post facto violation on ground that 18 USC §922(g)(9) was enacted after defendant's prior misdemeanor battery conviction; the phrase "similarly situated to a spouse" in the definition of a misdemeanor crime of domestic violence (18 USC §921(a)(33)(A)(ii)) is not unconstitutionally vague).
- *U.S. v Smith* (2001) 56 MJ 711, 715 (federal statute prohibiting possession of firearm after conviction of a misdemeanor crime of domestic violence did not violate accused's right to due process or a personal right under the Second Amendment to "keep and bear arms").

- *U.S. v Hutzell* (2000) 217 F3d 966 (conviction did not violate due process despite defendant's claim that he was unaware his conduct was illegal).
- *U.S. v Hancock* (2000) 231 F3d 557 (government did not have to prove defendant had actual knowledge that he was prohibited from possessing firearms; statute of conviction did not violate due process; due process clause did not require government to provide publicity to inform defendant of enactment of statute; and government did not entrap defendant by estoppel).
- *U.S. v Mitchell* (2000) 209 F3d 319 (conviction for possessing a firearm following conviction of a misdemeanor crime of domestic violence did not require proof that defendant knew that possessing a firearm was illegal, did not violate ex post facto clause, and did not violate due process on ground that defendant did not have notice that his continued possession of the firearm was illegal).
- *Fraternal Order of Police v U.S.* (1999) 173 F3d 898, 335 App DC 359 (police association brought action challenging amendments to Gun Control Act that prohibited domestic violence misdemeanants from possessing even government-issued firearms; the Court held that amendments did not violate equal protection clause, Second Amendment, Tenth Amendment, and Congress acted within its power under commerce clause in enacting amendments).
- *U.S. v Smith* (1999) 171 F3d 617 (statute is not unconstitutionally vague and does not violate Second Amendment or equal protection clause).
- *U.S. v Lewitzke* (1999) 176 F3d 1022, 1026 (statutory ban on firearm possession by those previously convicted of misdemeanor crime of domestic violence did not violate equal protection clause).
- *National Ass'n of Gov't Employees, Inc. v Barrett* (1997) 968 F Supp 1564 (18 USC §922(g)(9) does not exceed Congress's commerce clause authority; does not violate equal protection clause, Tenth Amendment, or substantive due process; and was not ex post facto law or bill of attainder).

The predicate domestic violence misdemeanor that initiates the application of 18 USC §922(g)(9) is not required to have a relationship between the defendant and the victim as an element.

- *U.S. v Hayes* (2009) 55 US 415, 129 S Ct 1079, 172 L Ed 2d 816 (domestic relationship need not be defining element of predicate offense to support conviction for possession of firearm by person convicted of misdemeanor crime of domestic violence).

Failing the relationship argument, some challenges focus on whether the predicate domestic violence misdemeanor that initiates the application of 18 USC §922(g)(9) contains an element of use of force.

- *U.S. v Castleman* (2014) 134 S Ct 1405 (*Castleman* resolved a split of authority among the courts of appeal regarding the degree of “physical force” necessary to meet the federal definition of a “misdemeanor crime of domestic violence.” See, for example, *Griffith*, *Belless*, and *Shelton* below). *Castleman* held that the degree of force that would suffice for a common law conviction of battery, including offensive touching, satisfies the requirement of “physical force.”
- *U.S. v Griffith* (2006) 455 F3d 1339 (*Griffith* argues that Georgia simple battery conviction does not qualify as predicate offense for 18 USC §922(g)(9) purposes because its contact element does not require physical force). The court held that Georgia simple battery statute, which prohibited contact of an insulting or provoking nature, qualified as a predicate offense. The question is not whether the actual conduct involved physical force, but whether the predicate domestic violence misdemeanor contains an element of use of force.
- *U.S. v Belless* (2003) 338 F3d 1063, 1068 (as a matter of law, we hold that the physical force to which the federal statute refers is not *de minimis*; the phrase “physical force” in the federal definition at 18 USC §921(a)(33)(A)(ii) means violent use of force against body of another individual).
- *U.S. v Shelton* (2003) 325 F3d 553, 555 (because defendant’s predicate offense of misdemeanor assault requires bodily injury, it includes use of physical force as an element).

B. [§1.7] EXEMPTIONS FROM FEDERAL RESTRICTIONS

There are *no* federal exemptions available to government personnel, including armed forces personnel and law enforcement officers. 18 USC §925(a)(1).

C. [§1.8] RELIEF FROM FEDERAL DISABILITY

A person subject to the restrictions of 18 USC §922(g)(9) may apply to the Attorney General for relief from the disabilities imposed by the federal laws. The Attorney General may grant such relief if he or she establishes to his or her satisfaction that the applicant is not likely to act in a manner dangerous to public safety based on the circumstances surrounding the disability and the applicant’s record and reputation, and granting the relief would not be contrary to public interest. 18 USC §925(c).

A person who is denied relief by the Attorney General can file a petition with the United States District Court for the district in which the person resides, requesting a judicial review of the decision. 18 USC §925(c).

Note: The relief from federal disability provision has been in the Code since 1992. However, Congress has annually prohibited the Bureau of Alcohol, Tobacco, Firearms, and Explosives from acting on individual applications for relief through restrictions in the ATF's appropriations.

D. [§1.9] CALIFORNIA RESTRICTIONS

It is unlawful for any person convicted of one or more of the following misdemeanors to own, purchase, receive, possess, or have in his or her custody or control, any firearm within 10 years of the conviction (Pen C §29805; *People v Mesce* (1997) 52 CA4th 618, 60 CR2d 745 (statute can be applied to defendant whose misdemeanor assault conviction predated statute's effective date without violating defendant's ex post facto rights)):

- Threatening public officers/employees and school officials. Pen C §71.
- Threatening certain public officials, appointees, judges, staff, or their immediate families. Pen C §76.
- Preventing or dissuading a victim or witness from giving testimony, contacting law enforcement, or assisting with prosecution. Pen C §136.1
- Having a deadly weapon with the intent to use the weapon to prevent or dissuade a victim or witness from giving testimony, contacting law enforcement, or assisting with prosecution. Pen C §136.5
- Threatening or using force on witnesses, victims, or informants. Pen C §140.
- Removing or attempting to remove a firearm from an officer who is performing his or her lawful duties. Pen C §148(d).
- Unauthorized possession of a weapon in a state or local public building. Pen C §171b.
- Possessing a loaded firearm within the state capitol, legislative offices, and Governor's offices. Pen C §171c.
- Possessing a loaded firearm within the Governor's mansion or residence or other constitutional office. Pen C §171d.
- Supplying a firearm knowing the firearm will be used to commit a felony. Pen C §186.28.

- Assault. Pen C §§240–241.
- Battery. Pen C §§242–243.
- Unlawful touching of a person who is unlawfully restrained. Pen C §243.4.
- Assault with a stun gun or taser weapon. Pen C §244.5.
- Assault with a deadly weapon or force likely to cause great bodily injury. Pen C §245.
- Assault with a deadly weapon or instrument, stun gun, or taser weapon, or by any means likely to produce great bodily injury, on a school employee engaged in the performance of duties. Pen C §245.5.
- Discharging a firearm in a grossly negligent manner. Pen C §246.3.
- Shooting at an unoccupied aircraft, motor vehicle, or uninhabited building or dwelling house. Pen C §247.
- Willful infliction of corporal injury on a current or former spouse, current or former cohabitant, or mother or father of defendant's child. Pen C §273.5.
- Intentional and knowing violation of a protective order. Pen C §273.6.
- Drawing or exhibiting any deadly weapon, including a firearm, in a rude, angry, or threatening manner, or unlawfully using a firearm in a fight or quarrel. Pen C §417.
- Drawing or exhibiting a firearm or other deadly weapon with the intentional infliction of serious bodily injury. Pen C §417.6.
- Threatening to cause death or great bodily injury to another person. Pen C §422.
- Possessing a firearm in a school zone. Pen C §626.9.
- Stalking. Pen C §646.9.
- Carrying a loaded firearm with the intent to commit a felony. Pen C §25800.
- Possessing a deadly weapon with intent to commit an assault. Pen C §17500.
- Driving or owning a vehicle and knowingly permitting another person to discharge a firearm from the vehicle, or any person who willfully and maliciously discharges a firearm from a motor vehicle. Pen C §26100(b), (d).
- Criminal possession of a firearm. Pen C §25300.

- Selling a concealable firearm to someone under 21 or a minor. Pen C §27510.
- Possessing or knowingly transporting a machine gun. Pen C §32625.
- Possessing handgun ammunition designed to penetrate metal or armor. Pen C §30315.
- Carrying a concealed or loaded firearm or other deadly weapon or wearing a peace officer uniform while engaged in picketing or other informational activities in a public place related to a refusal to work. Pen C §830.95.
- Possession of a firearm by a person ineligible to possess firearms because of his or her mental history. Welf & I C §8100.
- Providing a firearm or deadly weapon to a person who is prohibited from possessing firearms because of his or her mental history. Welf & I C §8101.
- Possession of a firearm by a person ineligible to possess a firearm because of specific mental prohibitions. Welf & I C §8103.
- Bringing or sending firearms or other contraband into a juvenile detention facility. Welf & I C §871.5.
- Bringing or sending firearms or other contraband into youth authority institutions. Welf & I C §1001.5. A licensed gun collector failing to report the out-of-state purchase of a relic pistol or other relic firearm capable of being concealed. Pen C §27590(c).

The court, on forms provided by the Department of Justice, must notify the department of persons subject to the prohibition. Pen C §29805.

A violation of Pen C § 29805 is punishable by imprisonment in a county jail for not more than one year or state prison, by a fine not exceeding \$1000, or by both the imprisonment and fine. Pen C §29805.

If a defendant is subject to the Pen C §29805 prohibitions, at the time of sentencing the court, on a form provided by the Department of Justice, must provide a notice to the defendant regarding the firearms prohibition and include a form to facilitate the transfer of firearms. If the firearms prohibition will expire on a date specified on the court order, the form shall inform the defendant that he or she may elect to transfer his or her firearm to a licensed firearms dealer. Pen C §§29810, 29830. Failure to provide the notice is not a defense to a violation of this section. Pen C §29810.

E. [§1.10] EXEMPTIONS FROM CALIFORNIA RESTRICTIONS

A peace officer, as described in Pen C §§830.1–830.2, 830.31–830.33, and 830.5, convicted under Pen C §273.5, §273.6 or §646.9, can

petition the court only once for relief from the firearms prohibition if that officer's employment or livelihood is dependent on the ability to legally possess a firearm.

The procedure is as follows (Pen C §29855):

(1) The petition must be filed in the court where the petitioner was sentenced and, if possible, heard by the same judge that sentenced the petitioner.

(2) The clerk shall set a hearing date and notify the petitioner and prosecuting attorney.

(3) The court may reduce or eliminate the prohibition, impose conditions on reducing or eliminating the prohibition, or otherwise grant relief as deemed appropriate by the court after making each of the following findings:

(a) The court must determine whether the petitioner, by a preponderance of the evidence, is likely to use a firearm in a safe and lawful manner (Pen C §29855(d)(1)).

(b) The court must determine whether or not the petitioner is within a prohibited class as specified in Pen C §29815, §29820, §29825, §29900, or §29800(a)–(b) and the court has not been presented with credible evidence that the petitioner is prohibited due to mental health issues as described in Welf & I C §8100 or §8103. Pen C §29855(d)(2).

(c) The petitioner does not have a previous Pen C §29805 conviction no matter when the prior conviction occurred. Pen C §29855(d)(3).

The court shall consider the petitioner's continued employment, the interests of justice, any relevant evidence, and the totality of the circumstances. The court shall require, as a condition of granting relief, that the petitioner agree to participate in counseling as deemed appropriate by the court. Pen C §29855(e).

Note: It was the legislative intent, through this exemption, to provide the court with broad discretion in fashioning appropriate relief when warranted. However, it is not the intent of the exemption to require courts to grant relief to any particular petitioner. Pen C §29855(e).

Note: People v Conley (2004) 116 CA4th 566, 10 CR3d 477. Conley, a sheriff's deputy, was convicted of violating Pen C §243, involving the 10-year prohibition under Pen C §29805, formerly Pen C §12021(c)(1). *Id* at 566. The trial court granted Conley's petition for relief from the 10-year prohibition under Pen C §29855, formerly Pen C §12021(c)(2). The Court of Appeal concluded that Conley was not subject to the prohibition based on a conviction for violating Pen C §273.5, 273.6, or 646.9 and, therefore, under the plain language of the statute, does not qualify for relief. Conley's argument that Pen C §29855, formerly Pen C §12021(c)(2), violates the equal protection clauses of the California and United States

Constitutions was rejected. The distinctions drawn by Pen C §29855, formerly Pen C §12021(c)(2), are rationally related to a legitimate public purpose and do not violate the equal protection clauses.

A person subject to the prohibition because of a conviction prior to that offense being a prohibiting misdemeanor can petition the court only once for relief from the firearms prohibition.

The procedure is as follows (Pen C §29860)):

(1) The petition must be filed in the court where the petitioner was sentenced and, if possible, heard by the same judge that sentenced the petitioner.

(2) The clerk shall set a hearing date and notify the petitioner and prosecuting attorney.

(3) The court may reduce or eliminate the prohibition, impose conditions on reducing or eliminating the prohibition, or otherwise grant relief as deemed appropriate by the court after making each of the following findings:

(a) The petitioner, by a preponderance of the evidence, is likely to use a firearm in a safe and lawful manner. Pen C §29860(d)(1).

(b) The petitioner is not within a prohibited class as specified in Pen C §29815, §29820, §29825, §29900, or §29800(a)–(b), and the court has not been presented with credible evidence that the petitioner is not prohibited due to mental health issues as described in Welf & I C §8100 or §8103. Pen C §29860(d)(2).

(c) The petitioner does not have a previous Pen C §29805 conviction no matter when the prior conviction occurred. Pen C §29860(d)(3).

The court shall consider the interests of justice, any relevant evidence, and the totality of the circumstances. Pen C §29860(e).

Note: It was the legislative intent, through this exemption, to provide the court with broad discretion in fashioning appropriate relief when warranted. However, it is not the intent of the exemption to require courts to grant relief to any particular petitioner. Pen C §29860(e).

III. [§1.11] CONDITION OF PROBATION—CALIFORNIA RESTRICTIONS

As an express condition of probation, a person can be prohibited from owning, possessing, controlling, receiving, or purchasing a firearm. Pen C §29815(a).

The court, on forms provided by the Department of Justice, must notify the department of persons subject to the prohibition. The notice must include a copy of the probation order and a copy of the minute order

or any abstract reflecting the order and conditions of probation. Pen C §29815(b).

A violation of Pen C §29815(a) is punishable by imprisonment in a county jail for not more than one year or state prison, by a fine not exceeding \$1000, or by both the imprisonment and fine. Pen C §29815(a).

IV. [§1.12] JUVENILE COURT—CALIFORNIA RESTRICTIONS

It is unlawful for any person alleged to have committed one of the offenses listed below and who has been adjudged a ward of the court within the meaning of Welf & I C §602 to own, have in his or her possession, or have under his or her custody or control, any firearm until the age of 30 years. Pen C §29820(b).

The following are applicable offenses (Pen C §29820(a)(2); Welf & I C §707(b)):

- Murder.
- Arson that causes great bodily injury or arson of an inhabited structure or property. Pen C §451(a)–(b).
- Robbery.
- Rape with force, violence, or threat of great bodily harm.
- Sodomy by force, violence, duress, menace, or threat of great bodily harm.
- Lewd or lascivious act on a child under the age of 14. Pen C §288(b).
- Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
- Sexual penetration by force, violence, duress, menace, or fear of immediate and unlawful bodily injury. Pen C §289(a).
- Kidnapping for ransom.
- Kidnapping for purpose of robbery.
- Kidnapping with bodily harm.
- Attempted murder.
- Assault with a firearm or destructive device.
- Assault by any means of force likely to produce great bodily injury.
- Discharge of a firearm into an inhabited or occupied building.
- Specified crimes against persons 60 years of age or older, blind persons, paraplegics, quadriplegics, and persons confined to a wheelchair. Pen C §1203.09.

- Use of a firearm in the commission or attempted commission of a felony, use of an assault weapon or machine gun in the commission or attempted commission of a felony, or discharge of a firearm at an occupied motor vehicle or someone outside a motor vehicle causing great bodily injury or death. Pen C §12022.5 or §12022.53.
- Any felony offense in which the minor personally used a weapon described in Pen C §16590.
- Felony intimidation of a witness or victim as described in Pen C §136.1; influencing the testimony or information given to a law enforcement official; or threat of force, force, or use of fraud to induce false testimony as described in Pen C §137.
- Manufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance specified in Health & S C §11055(e).
- Possessing for sale, or selling a substance containing 28.5 grams or more of cocaine or meth as specified in Pen C §1203.073(b).
- Any of the specified violent felonies listed in Pen C §667.5(c) committed for the benefit of, at the direction of, or in association with any criminal street gang as described in Pen C §186.22(b).
- Intentionally inflicting great bodily injury on an employee of a juvenile facility during an escape by the use of force or violence in violation of Welf & I C §871(b).
- Torture. Pen C §§206–206.1.
- Aggravated mayhem. Pen C §205.
- Carjacking as described in Pen C §215 while armed with a dangerous or deadly weapon.
- Kidnapping for purpose of sexual assault. Pen C §209(b).
- Kidnapping during commission of a carjacking. Pen C §209.5.
- Willfully and maliciously discharging a firearm from a motor vehicle at another person other than an occupant of a motor vehicle. Pen C §26100(c).
- Exploding, igniting, or attempting to explode or ignite any destructive device or explosive with intent to commit murder. Pen C §18745.
- Voluntary manslaughter as described in Pen C §192(a).
- Any of the offenses listed in Pen C §29805.
- Carrying a concealed firearm. Pen C §25400(a).

- Carrying a loaded firearm on the person or in a vehicle while in a public place or on any public street in an unincorporated city or prohibited unincorporated territory. Pen C §25850.

A violation of Pen C §29820 is punishable by imprisonment in a county jail for not more than one year or state prison, by a fine not exceeding \$1000, or by both the imprisonment and fine. Pen C §29820.

The juvenile court, on Department of Justice forms, must notify the department of persons subject to these prohibitions. The forms must be submitted to the Department of Justice and may be used to determine eligibility to acquire a firearm. Pen C §29820(d).

V. MENTAL HEALTH

A. [§1.13] FEDERAL RESTRICTIONS

Federal law prohibits selling or otherwise disposing of any firearms or ammunition to any person the transferor knows or reasonably should have known has been adjudicated as a mental defective or has been committed to any mental institution. 18 USC §922(d)(4).

A knowing violation results in a fine, imprisonment for no more than ten years, or both. 18 USC §924(a)(2).

Note: The prohibition does not apply to self-committals or observational holds.

Federal law prohibits a person, who has been adjudicated as a mental defective or has been committed to any mental institution, from transporting, possessing, or receiving any firearm or ammunition. 18 USC §922(g)(4).

A knowing violation results in a fine, imprisonment for no more than ten years, or both. 18 USC §924(a)(2).

A person who violates 18 USC §922(g) and has three previous convictions by any court for a violent felony or serious drug offense or both, committed on occasions different from one another, is subject to a fine and imprisonment not less than 15 years. As to the conviction under 18 USC §922(g), the court cannot suspend the sentence or grant a probationary sentence. 18 USC §924(e)(1).

A “violent felony” means any crime punishable by more than one year in prison or an act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be subject to imprisonment for more than one year if committed by an adult and includes the following elements (18 USC §924(e)(2)(B)):

- The use, attempted use, or threatened use of physical force against another; or

- Burglary, arson, or extortion; the use of explosives; or otherwise conduct that poses a serious potential risk of physical injury to another.

The term “conviction” includes an act of juvenile delinquency involving a violent felony. 18 USC §924(e)(2)(C).

B. [§1.14] EXEMPTIONS FROM FEDERAL RESTRICTIONS

The federal firearms restrictions discussed in §1.1 do not apply to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of the United States or any department or agency thereof or any state or any department, agency, or political subdivision thereof. 18 USC §925(a)(1).

Note: Although armed forces personnel and law enforcement officers fall within this federal exemption, they may still be subject to state restrictions. Although this exemption applies when performing official duties that require a firearm, it does not extend to the use of personal firearms.

C. [§1.15] RELIEF FROM FEDERAL DISABILITY

A person subject to the restrictions of 18 USC §922(g)(4) may apply to the Attorney General for relief from the disabilities imposed by the federal laws. The Attorney General may grant such relief if he or she establishes to his or her satisfaction that the applicant is not likely to act in a manner dangerous to public safety based on the circumstances surrounding the disability and the applicant’s record and reputation, and granting the relief would not be contrary to public interest. 18 USC §925(c).

A person who is denied relief by the Attorney General can file a petition with the United States District Court for the district in which the person resides, requesting a judicial review of the decision. 18 USC §925(c).

Note: The relief from federal disability provision has been in the Code since 1992. However, Congress has annually prohibited the Bureau of Alcohol, Tobacco, Firearms, and Explosives from acting on individual applications for relief through restrictions in the ATF’s appropriations.

D. CALIFORNIA RESTRICTIONS

1. [§1.16] In-Patient Treatment

It is unlawful for a person admitted to a facility on or after January 1, 1992, who is receiving inpatient treatment and is, in the opinion of the health professional who has primary care, a danger to self or others to purchase or receive; attempt to purchase or receive; or have in his or her

possession, custody, or control, any firearms. This applies even if the patient has consented to treatment. Welf & I C §8100(a).

- The firearms prohibition ends when the person is discharged from the facility. Welf & I C §8100(a).
- A violation of Welf & I C §8100(a) is punishable by imprisonment in a county jail for not more than one year or state prison, by a fine not exceeding \$1000, or by both the imprisonment and fine. Welf & I C §8100(g).
- A *danger to self or others* is specified in Welf & I C §§5150, 5250, and 5300. Welf & I C §8100(a).
- A “danger to self,” as used in Welf & I C §8100(a), means a voluntary person who has made a serious threat of, or attempted, suicide with the use of a firearm or other deadly weapon. Welf & I C §8100(f).

2. [§1.17] Psychotherapist Communication

It is unlawful for a person, who communicates to a licensed psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims, to purchase or receive, attempt to purchase or receive, possess, and have in custody or control for a period of five years, any firearms or other deadly weapon. Welf & I C §8100(b)(1). The prohibition period in effect from 1992 to 2013 was six months.

- The prohibition does not apply unless the licensed psychotherapist notifies local law enforcement of the threat by the person. Welf & I C §8100(b)(1).
- The five-year period starts the date the licensed psychotherapist reports to the local law enforcement agency the identity of the person making the communication. Welf & I C §8100(b)(1).
- Upon receipt of the report from the local law enforcement agency, the Department of Justice must notify the person, by certified mail (return receipt requested), of the following:
 - He or she is prohibited from possessing, having custody or control over, receiving, or purchasing any firearm or other deadly weapon for a period of five years. The notice must state when the prohibition starts and ends. Welf & I C §8100(b)(2)(A).
 - He or she may petition a court for an order permitting the person to own, possess, control, receive, or purchase a firearm. Welf & I C §8100(b)(2)(B).

- When the petition is filed, the court clerk shall set a hearing date and notify the Department of Justice and district attorney. Welf & I C §8100(b)(3)(A).
- The People of the State of California shall be the respondent in the petition and will be represented by the district attorney. Welf & I C §8100(b)(3)(A).
- The People of the State of California bear the burden of showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner. Welf & I C §8100(b)(3)(B).
- Upon the district attorney's motion, or its own motion, the court may transfer the petition to the county where the person made the statements or to the county where the person resided at the time the statements were made. Welf & I C §8100(b)(3)(A).
- Within seven days of receiving the petition, the Department of Justice shall file copies of the report with the court. Welf & I C §8100(b)(3)(A).
- Upon request, the reports shall be disclosed to the person and the district attorney. Welf & I C §8100(b)(3)(A).
- The district attorney is entitled to a continuance of the hearing date no less than 14 days after the clerk notified the district attorney of the court date. Welf & I C §8100(b)(3)(A).
- The court shall conduct the hearing in camera with only the relevant parties present if the petitioner establishes that confidential information is likely to be discussed that can cause harm to the petitioner. However, the court can find that the public interest would be better served by holding the hearing in public. Welf & I C §8100(b)(3)(A).
- Declarations, police reports, including criminal history information, and any other relevant and material evidence, not excluded by Evid C §352, are admissible at the hearing. Welf & I C §8100(b)(3)(A).
- If the court finds by a preponderance of the evidence that the People of the State of California have not met their burden of proof and that the person would be likely to use firearms in a safe and lawful manner, the court must lift the prohibition and allow the person to receive, possess, purchase, and have custody or control over firearms. Welf & I C §8100(b)(3)(A), (C).

- A copy of the order shall be submitted to the Department of Justice and, upon receipt of the order, the Department of Justice must delete any reference to the firearms prohibition from the person's state summary criminal history information. Welf & I C §8100(b)(3)(A), (C).

The five-year period starts the date the licensed psychotherapist reports to the local law enforcement agency the identity of the person making the communication. Welf & I C §8100(b)(1).

- If the district attorney declines to attempt to show that the person would not be likely to use firearms in a safe and lawful manner, or fails to go forward in the hearing, the court shall order that the person is not subject to the five-year prohibition on firearms. Welf & I C §8100(b)(3)(B). A copy of the order shall be submitted to the Department of Justice, and within 15 days of receipt, the department must delete any reference to the firearms prohibition from the person's state summary criminal history information. Welf & I C §8100(b)(3)(B).

3. [§1.18] Adjudicated by Court

It is unlawful for a person who has been adjudicated by a court of any state to be a danger to others as a result of mental illness or disorder, or who has been adjudicated to be a mentally disordered sex offender, to purchase or receive, attempt to purchase or receive, or have in his or her possession or control, any firearm or other deadly weapon. Welf & I C §8103(a)(1).

- The prohibition does not apply if the court issues a certificate upon release from treatment or at a later date stating that the person may possess a firearm or other deadly weapon without endangering others and the person has not, subsequent to issuance of the certificate, been adjudicated by a court to be a danger to others as the result of a mental illness or disorder. Welf & I C §8103(a)(1).
- The court must, as soon as possible but not later than two court days after issuing a court order finding the person to be a danger or issuing a certificate releasing the prohibition, notify the Department of Justice of the person's prohibition or release from prohibition by a certificate. Welf & I C §8103(a)(2).
- A violation of Welf & I C §8103(a) is punishable by imprisonment in a county jail for not more than one year or state prison. Welf & I C §8103(i).

4. [§1.19] Not Guilty by Reason of Insanity

It is unlawful for a person who has been found not guilty by reason of insanity of specified crimes, to purchase or receive, attempt to purchase or receive, or have in his or her possession or control, any firearm or other deadly weapon. Welf & I C §8103(b)(1).

- The court must as soon as possible but not later than two court days after issuing the order, notify the Department of Justice of the person's prohibition. Welf & I C §8103(b)(2).
- A violation of Welf & I C §8103(b) is punishable by imprisonment in a county jail for not more than one year or state prison. Welf & I C §8103(i).

5. [§1.20] Guilty by Reason of Insanity

It is unlawful for a person who has been found guilty by reason of insanity under Pen C §1026, or the law of any other state or the United States, of a crime different from those listed in Welf & I C §8103(b)(1), to purchase or receive, attempt to purchase or receive, or have in his or her possession or control, any firearm or other deadly weapon. Welf & I C §8103(c)(1).

- The prohibition does not apply if the court of commitment finds that the person has recovered sanity, under Pen C §1026.2 or the law of any other state or the United States. Welf & I C §8103(c)(1).
- The court must, as soon as possible but not later than two court days after issuing the order, notify the Department of Justice of the person's prohibition or release from the prohibition because of a sanity finding. Welf & I C §8103(c)(2).
- A violation of Welf & I C §8103(c) is punishable by imprisonment in a county jail for not more than one year or state prison. Welf & I C §8103(i).

6. [§1.21] Mentally Incompetent to Stand Trial

It is unlawful for a person found by a court to be mentally incompetent to stand trial under Pen C §1370 or §1370.1 or the law of another state or the United States, to purchase or receive, attempt to purchase or receive, or have in his or her possession or control, any firearm or other deadly weapon. Welf & I C §8103(d)(1).

- The prohibition does not apply if there has been a finding of restoration to competence to stand trial by the committing court, under Pen C §1372 or the law of any other state or the United States. Welf & I C §8103(d)(1).

- The court must, as soon as possible but not later than two court days after issuing the order, notify the Department of Justice of the person's prohibition or release from the prohibition because of a competence finding. Welf & I C §8103(d)(2).
- A violation of Welf & I C §8103(d) is punishable by imprisonment in a county jail for not more than one year or state prison. Welf & I C §8103(i).

7. [§1.22] Conservatorship

It is unlawful for a person placed under conservatorship by a court, because the person is gravely disabled due to a mental disorder or impairment by chronic alcoholism, to purchase or receive, attempt to purchase or receive, or have in his or her possession or control, any firearm or other deadly weapon if at the time of the conservatorship or thereafter, the court finds that possession of a firearm or other deadly weapon would present a danger to that person or others. The person must be notified of this prohibition. Welf & I C §8103(e)(1).

- The court must, as soon as possible but not later than two court days after placing the person under conservatorship, notify the Department of Justice of the person's prohibition and show the start and end date of the conservatorship. If the conservatorship ends before the date listed on the notice, or the court subsequently finds that possession of a firearm or other deadly weapon by the person would no longer pose a danger to others or to that person, the court shall notify the Department of Justice as soon as possible but not later than two court days after the conservatorship is terminated. Welf & I C §8103(e)(2).

Note: The information provided to the Department of Justice is confidential and can be used only to determine eligibility to purchase or possess firearms or other deadly weapons. Welf & I C §8103(e)(3).

- A violation of Welf & I C §8103(e) is punishable by imprisonment in a county jail for not more than one year or state prison. Welf & I C §8103(i).

8. [§1.23] Involuntary Admittance (“5150”)

It is unlawful for a person who has been taken into custody (under Welf & I C §5150), assessed, and admitted to a designated facility, because that person is a danger to himself or herself or others, to purchase or receive, or have in his or her possession or control, any firearm or other deadly weapon for a five-year period after release from the facility. Welf & I C §8103(f)(1).

- A violation of Welf & I C §8103(f) is punishable by imprisonment in a county jail for not more than one year or state prison. Welf & I C §8103(i).
- The admitting facility is responsible for providing notice to the Department of Justice and to the admitted person. In addition, the facility must inform the person that he or she can request a hearing regarding the prohibition, and the facility must provide the individual with the appropriate Department of Justice form. If the person requests a hearing at the time of discharge, the facility must forward the request to the court, unless the person advises that he or she will submit the form. Welf & I C §8103(f)(2)–(3).
- During the five-year period, only one hearing request can be made by the person. Welf & I C §8103(f)(4).

The hearing shall be conducted as follows:

- (1) When the petition is filed, the court clerk shall set a hearing date and notify the person, Department of Justice, and district attorney. Welf & I C §8103(f)(5).
- (2) The People of the State of California shall be the plaintiff in the petition and will be represented by the district attorney. Welf & I C §8103(f)(5).
- (3) Upon the district attorney's motion, or its own motion, the court may transfer the petition to the county where the person resided at the time of his or her detention, the county where the person was detained, or the county where the person was evaluated or treated. Welf & I C §8103(f)(5).
- (4) Within seven days of receiving the petition, the Department of Justice shall file copies of the report with the court. Welf & I C §8103(f)(5).
- (5) On request, the reports shall be disclosed to the person and the district attorney. The district attorney may notify the county mental health director of the hearing, and the director shall provide relevant detention information that must be filed with the court. Welf & I C §8103(f)(5).
- (6) The district attorney is entitled to a continuance of the hearing date no less than 14 days after the clerk notified the district attorney of the court date. The total length of time for all continuances cannot exceed 60 days. Welf & I C §8103(f)(5).
- (7) The court shall conduct the hearing in camera with only the relevant parties present if the petitioner establishes that confidential information is likely to be discussed that can cause harm to the petitioner. However, the court can find that the public interest would be better served by holding the hearing in public. Welf & I C §8103(f)(5).

- (8) Declarations, police reports, including criminal history information, and any other relevant and material evidence, not excluded by Evid C §352, is admissible at the hearing. Welf & I C §8103(f)(5).
- (9) The district attorney bears the burden to show by a preponderance of the evidence that the petitioner will not use firearms or deadly weapons in a safe and lawful manner. If the court finds that the district attorney did not meet his or her burden, the court shall order that the person not be subject to the prohibition and allow the person to receive, possess, purchase, and have custody or control over firearms. Welf & I C §8103(f)(6)–(7). A copy of the order shall be submitted to the Department of Justice and, upon receipt of the order, the Department of Justice must delete any reference to the firearms prohibition from the person's state summary criminal history information. Welf & I C §8103(f)(7).

9. [§1.24] Certified for Intensive Treatment

It is unlawful for a person who has been certified for intensive treatment under Welf & I C §§5250, 5260, and 5270.15, to purchase or receive, or have in his or her possession or control, any firearm or other deadly weapon for a five-year period. Welf & I C §8103(g)(1).

- A violation of Welf & I C §8103(g) is punishable by imprisonment in a county jail for not more than one year or state prison. Welf & I C §8103(i).
- The treating facility is responsible for providing notice to the Department of Justice and to the person. In addition, the facility must inform the person that he or she can request a hearing regarding the prohibition, and the facility must provide the individual with the appropriate Department of Justice form. If the person requests a hearing at the time of discharge, the facility must forward the request to the court, unless the person advises that he or she will submit the form. Welf & I C §8103(g)(2)–(3).

The hearing shall be conducted as follows:

- (1) When the petition is filed, the court clerk shall set a hearing date and notify the person, Department of Justice, and district attorney. Welf & I C §8103(g)(4).
- (2) The People of the State of California shall be the respondent in the petition and will be represented by the district attorney. Welf & I C §8103(g)(4).
- (3) Upon the district attorney's motion, or its own motion, the court may transfer the petition to the county where the person resided at the time of his or her detention, the county where the person was detained, or the county where the person was evaluated or treated. Welf & I C §8103(g)(4).

- (4) Within seven days of receiving the petition, the Department of Justice shall file copies of the report with the court. Welf & I C §8103(g)(4).
- (5) On request, the reports shall be disclosed to the person and the district attorney. The district attorney may notify the county mental health director of the hearing, and the director shall provide relevant detention information that must be filed with the court. Welf & I C §8103(g)(4).
- (6) The district attorney is entitled to a continuance of the hearing date no less than 14 days after the clerk notified the district attorney of the court date. Welf & I C §8103(g)(4).
- (7) The court shall conduct the hearing in camera with only the relevant parties present if the petitioner establishes that confidential information is likely to be discussed that can cause harm to the petitioner. However, the court can find that the public interest would be better served by holding the hearing in public. Welf & I C §8103(g)(4).
- (8) Declarations, police reports, including criminal history information, and any other relevant and material evidence, not excluded by Evid C §352, is admissible at the hearing. Welf & I C §8103(g)(4).
- (9) If the court finds by a preponderance of the evidence that the person would be likely to use firearms in a safe and lawful manner, the court can lift the prohibition and allow the person to receive, possess, purchase, and have custody or control over firearms. Welf & I C §8103(g)(4).

A copy of the order shall be submitted to the Department of Justice and, upon receipt of the order, the Department of Justice must delete any reference to the firearms prohibition from the person's state summary criminal history information. Welf & I C §8103(g)(4).

It is unlawful for any person to knowingly supply, sell, give, or allow possession or control of a deadly weapon, to a person prohibited under Welf & I C §§8100 and 8103. A violation is punishable by imprisonment in county jail or state prison for no longer than one year, a fine not exceeding \$1000, or both. Welf & I C §8101(a).

It is unlawful for any person to knowingly supply, sell, give, or allow possession or control of a firearm to a person prohibited under Welf & I C §§8100 and 8103. A violation is punishable by imprisonment in state prison for two, three, or four years. Welf & I C §8101(b).

VI. SEIZURE AND FORFEITURE

A. [§1.25] FEDERAL

Any firearm or ammunition involved in or used in any knowing violation of 18 USC §922(a)(4), (a)(6), (f), (g), (h), (i), (j), (k), or (l), or

willful violation of any provision of 18 USC ch 44, or any violation of any other criminal law of the United States is subject to seizure and forfeiture as set forth in the Internal Revenue Code of 1986. 18 USC §924(d)(1).

Firearms or ammunition will be returned to the owner or possessor or their designee if charges are dismissed (only if dismissal is other than government motion) or a court order lapses or terminates, unless the return of the firearms or ammunition would place the owner or possessor or his or her delegate in violation of any law. An action for forfeiture of firearms or ammunition must be commenced within 120 days of seizure. 18 USC §924(d)(1).

B. [§1.26] CALIFORNIA

A firearm illegally carried on a person or in any vehicle, and any firearm illegally owned, possessed, or used in the commission or attempted commission of a felony or specified misdemeanors is, upon defendant's conviction or a juvenile court finding that an offense that would be a misdemeanor or felony if committed by an adult was committed or attempted by the juvenile with the use of a firearm, a nuisance. Pen C §29300(a).

The firearm must be surrendered to law enforcement. Unless a judge or district attorney in the county certifies that retention of the firearms is necessary or proper to the ends of justice, law enforcement holding the surrendered weapons may sell or destroy them annually. If a firearm was stolen and the lawful owner had no prior knowledge of how it would be used, the firearm cannot be sold or destroyed, but must be returned to the lawful owner if their identity and address can reasonably be ascertained, as soon as its use as evidence has been served. Pen C §§18000, 18005.

A peace officer at the scene of a domestic violence incident involving a threat to human life or a physical assault must take custody of any firearm or other deadly weapon in plain sight or discovered under a consensual or other lawful search, as necessary to protect the officer and any other persons present. The officer must provide a receipt to the owner or possessor of the firearm or other deadly weapon. The firearm or other deadly weapon must be held at least 48 hours. Pen C §§18250, 18255, 18265(a).

If the firearm is not retained as evidence related to criminal charges brought as a result of the incident or is not retained because it was illegally possessed, the firearm or other deadly weapon must be made available to the owner or person in lawful possession 48 hours after the seizure or no later than five business days after the seizure. Pen C §18265(b).

If a civil action or proceeding is brought regarding return of the firearms, which were not returned within the required time, the court must award reasonable attorneys' fees to the prevailing party. Pen C §18265(c).

Any firearm or other deadly weapon that is not recovered by the lawful owner or person in lawful possession within 12 months of being taken into custody is considered a nuisance and can be sold or destroyed. If the firearm or deadly weapon is not recovered because of an extended hearing process, the firearm or deadly weapon cannot be sold or destroyed, unless the court does not order a return. Pen C §18275.

If a law enforcement agency has reasonable cause to believe that return of a firearm or other deadly weapon would likely endanger the victim or another person who reported the assault or threat, the agency must advise the owner of the firearm or other deadly weapon, and within 60 days of the seizure date file a petition in court to determine if the firearm or deadly weapon should be returned. Pen C §18400(a).

- The law enforcement agency can make an ex parte application showing good cause for extension of time for filing the petition, but in any event, a petition must be filed within 90 days from the date of the seizure. Pen C §18400(b), (c).
- The law enforcement agency must inform the owner or person who had lawful possession, by registered mail at the last known address, that the person has 30 days from the date of receipt of the notice to inform the court clerk that he or she wants a hearing. Failure to respond will result in a default order forfeiting the firearm or other deadly weapon. Pen C §18405(a).

Note: The person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. When the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements. Pen C §18405(b), (c).

- If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Pen C §18415.
- If the person requests a hearing, the court clerk must set a date no later than 30 days from the date of the request. The court clerk must notify the person, law enforcement agency, and district attorney of the date, time, and location of the hearing. Pen C §18410(a), (b).
- Unless it is shown by a preponderance of the evidence that return of the firearm or other deadly weapon would result in endangering the victim or other person who reported the assault or threat, the

court must award return of the firearm or other deadly weapon and award reasonable attorneys' fees to the prevailing party. Pen C §18410(c).

- If the court does not order the return of the firearm or other deadly weapon, the owner or person having lawful possession may petition the court for a second hearing within 12 months of the date of the initial hearing. Unless it is shown by clear and convincing evidence that return of the firearm or other deadly weapon would result in endangering the victim or other person who reported the assault or threat, the court must award return of the firearm or other deadly weapon and award reasonable attorneys' fees to the prevailing party. If the person does not petition for a second hearing within this 12-month period or is unsuccessful at the second hearing, law enforcement may dispose of the firearm or other deadly weapon as provided in Pen C §18420.

The Attorney General, district attorney, or city attorney can bring an action to enjoin the manufacture of, importation of, sale of, offering or exposing for sale, giving, lending, or possessing any item that constitutes a nuisance, including black jacks, slingshots, billies, nunchakus, sandclubs, sandbags, shurikens, metal knuckles, short-barreled shotguns, short-barreled rifles, cane guns, wallet guns, any undetectable firearm, any firearm not immediately recognizable as a firearm, zip guns, or unconventional pistols. Pen C §18010. These weapons are subject to confiscation and summary destruction whenever found in the state. Upon the certification of a judge or district attorney, the weapon will be preserved in the interests of justice until its necessity ceases, then the weapon will be destroyed under the procedures in Pen C §18010(b), (c).

It is a public nuisance to possess a machine gun in violation of the permit and/or license provisions in Chapter 6 of Division 10 of Title 4 of Part 6 of the Penal Code (provisions relating to machine guns). The Attorney General, district attorney, or city attorney can bring an action to enjoin possession. The machine gun must be surrendered to the Department of Justice and the department will destroy the machine gun so as to make it unusable and unrepairable as a machine gun. Upon the certification of a judge or district attorney, the weapon will be preserved in the interests of justice. Pen C §32750.

A person who has been detained or apprehended for examination of his or her mental condition or who is a person described in Welf & I C §8100 or §8103, who is found to own or have in his or her possession or under his or her control any firearm or other deadly weapon, will have the firearm or other deadly weapon confiscated and retained by a law enforcement agency. Welf & I C §8102(a).

The law enforcement agency must issue a receipt and inform the person of the procedure for return of the firearms or other deadly weapons. Welf & I C §8102(b)(1).

- Upon the detained person's release, the confiscating law enforcement agency has 30 days to initiate a petition in court for a hearing to determine if the firearms or other deadly weapons would likely result in endangering the person or others, and to send a notice to the person advising the person of his or her right to a hearing on the issue. Welf & I C §8102(c).
- The law enforcement agency can make an ex parte application for a time extension on filing the petition. The extension can be no longer than 60 days from the date of the person's release. Welf & I C §8102(c).
- In either case, if the law enforcement agency does not initiate a petition within the required time, the firearms or other deadly weapons must be returned, upon compliance with all applicable requirements, including the requirements specified in Pen C §§33850–33895. Welf & I C §8102(d).
- The law enforcement agency must inform the person that he or she has 30 days to respond to the court clerk regarding his or her desire for a hearing and that the failure to respond will result in a default order forfeiting the firearms or other deadly weapons. Welf & I C §8102(e).

If the person responds and requests a hearing, the court clerk must set a hearing within 30 days from receipt of the request. The court clerk must notify the person and the district attorney of the date, time, and location of the hearing. Welf & I C §8102(f). *Rupf v Yan* (2000) 85 CA4th 411, 102 CR2d 157 (Welf & I C §8102 is not facially invalid so as to deny the individual substantive due process, is not vague or overbroad, is not facially flawed simply because it does not mandate release of the weapon when a person is released from custody under Welf & I C §5150, and is not unconstitutionally overbroad).

Chapter 2

PROTECTIVE ORDER FIREARMS RESTRICTIONS

I. Federal Protective Order Restrictions

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II. California Protective Order Restrictions

- A. [§2.4] Emergency Protective Order (Fam C §§6240–6274)
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I. FEDERAL PROTECTIVE ORDER RESTRICTIONS

A. [§2.1] FEDERAL RESTRICTIONS

Federal law prohibits a person subject to a court order from transporting, possessing, or receiving any firearm or ammunition. 18 USC §922(g)(8). The federal law applies to a court order that:

- Issues after a hearing in which the person has actual notice and an opportunity to be heard (18 USC §922(g)(8)(A));

Note: U.S. v Young (2006) 458 F3d 998 (defendant argues that 18 USC §922(g)(8)(A) provides no specific definition for “hearing,” “actual notice,” and “opportunity to be heard”; therefore Congress intended to require a full due process hearing. Court disagrees and finds the terms

“hearing,” “actual notice,” and “opportunity to be heard,” should be given their ordinary meaning and do not require further elaboration).

- Restrains the person from harassing, stalking, or threatening an intimate partner or a child of the intimate partner or person, or restrains the person from engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child (18 USC §922(g)(8)(B)); and
- Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child *or* by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury. 18 USC §922(g)(8)(C)(i)–(ii).

An “intimate partner” means spouse or former spouse, an individual who is a parent of the child of the person, and a cohabitant or former cohabitant. 18 USC §921(a)(32).

Note: This is a limited definition that does not correspond to California state statute.

A knowing violation of 18 USC §922(g)(8) results in a fine, imprisonment for no more than 10 years, or both. 18 USC §924(a)(2).

Federal law prohibits selling or otherwise disposing of any firearms or ammunition to any person the transferor knows or reasonably should have known was subject to a court order (see discussion above for required elements that make a court order subject to federal law). 18 USC §922(d)(8).

A knowing violation results in a fine, imprisonment for no more than ten years, or both. 18 USC §924(a)(2).

Several cases have challenged the constitutionality of 18 USC §922(g)(8) and failed:

- *U.S. v Luedtke* (2008) 589 FSupp2d 1018 (one of many failed challenges after *District of Columbia v Heller* (2008) 128 SCt 2783). *Heller* struck down the District of Columbia’s ban on handgun possession. The *Luedtke* court noted that *Heller* did not cast doubt on the types of firearms prohibitions traditionally declared constitutional such as those prohibiting firearm possession by felons and the mentally ill. *Luedtke* held that, even under a strict scrutiny analysis, 18 USC §922(g)(8) constitutes one of the permissible limitations on individuals under the Second Amendment.

- *U.S. v Coccia* (2006) 446 F3d 233 (statute prohibiting possession of firearm while being subject to restraining order did not require that the restraining order expressly state that the use of physical force was prohibited; statute did not violate Second Amendment, Commerce Clause, or Tenth Amendment).
- *U.S. v Lippman* (2004) 369 F3d 1039 (conviction did not violate defendant's Second Amendment rights because defendant did not show that his firearm possession was reasonably related to well-regulated militia). Even if the court found that the Second Amendment protects an individual's right to bear arms, the defendant's constitutional argument would still fail as applied to him. The restraining order issued against defendant was narrowly tailored to restrict his firearm possession, and Congress has a compelling government interest in enacting 18 USC §922(g)(8) to decrease domestic violence.
- *U.S. v Bayles* (2002) 310 F3d 1302 (conviction did not violate defendant's Second Amendment rights; statute is valid under commerce clause).
- *U.S. v Emerson* (2001) 270 F3d 203 (statute does not violate commerce clause; Second Amendment protects individual Americans in their right to keep and bear arms, but rights protected by Second Amendment are subject to restrictions that are reasonable and not inconsistent with right as historically understood).
- *U.S. v Reddick* (2000) 203 F3d 767 (defendant's due process rights were not violated when he was convicted despite lack of knowledge of federal law prohibiting possession of firearm while under domestic violence restraining order).
- *U.S. v Jones* (2000) 231 F3d 508 (statute does not violate the commerce clause or Tenth Amendment).
- *U.S. v Napier* (2000) 233 F3d 394 (statute does not violate the Fifth Amendment in not requiring actual notice of the gun prohibition; statute is not an unconstitutional exercise of Congress's power under the commerce clause; statute does not violate the Second Amendment right to bear arms; the Second Amendment does not create an individual right to bear arms, but applies only to the right of the state to maintain a militia).
- *U.S. v Kafka III* (2000) 222 F3d 1129 (conviction did not violate defendant's due process rights, even though only defendant's possession of firearm was knowing, and he did not know that his possession violated the statute under which he was convicted).

- *U.S. v Bostic* (1999) 168 F3d 718 (statute did not violate notice and fair warning principles embodied in the Fifth Amendment; statute did not exceed Congress's authority under commerce clause; statute did not violate the Tenth Amendment).
- *U.S. v Baker* (1999) 197 F3d 211 (statute proscribing possession of firearm while subject to domestic violence protection order did not violate equal protection; defendant was not deprived of procedural due process; statute was valid exercise of Congress's commerce clause power).
- *U.S. v Meade* (1999) 175 F3d 215 (statute prohibiting firearm possession by person subject to anti-harassment order did not violate Tenth Amendment or due process clause).
- *U.S. v Cunningham* (1998) 161 F3d 1343 (Congress did not exceed its authority under the commerce clause in enacting statute).
- *U.S. v Wilson* (1998) 159 F3d 280 (statute was valid exercise of Congress's power under commerce clause; statute did not violate Tenth Amendment or due process).

B. [§2.2] EXEMPTIONS FROM FEDERAL RESTRICTIONS

The federal firearms restrictions discussed in §2.1 do not apply to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of the United States or any department or agency thereof or any state or any department, agency, or political subdivision thereof. 18 USC §925(a)(1).

Note: Although armed forces personnel and law enforcement officers fall within this federal exemption, they may still be subject to state restrictions. Although this exemption applies when performing official duties that require a firearm, it does not extend that exemption to the use of personal firearms.

C. [§2.3] RELIEF FROM FEDERAL DISABILITY

A person who is subject to the restrictions of 18 USC §922(g)(8) may apply to the Attorney General for relief from the disabilities imposed by the federal laws. The Attorney General may grant such relief if he or she establishes to his or her satisfaction that the applicant is not likely to act in a manner dangerous to public safety based on the circumstances surrounding the disability and the applicant's record and reputation, and granting the relief would not be contrary to public interest. 18 USC §925(c).

A person who is denied relief by the Attorney General can file a petition with the United States District Court for the district in which the person resides, requesting a judicial review of the decision. 18 USC §925(c).

Note: The relief from federal disability provision has been in the code since 1992. However, Congress has annually prohibited the Bureau of Alcohol, Tobacco, Firearms, and Explosives from acting on individual applications for relief through restrictions in the ATF's appropriations.

II. CALIFORNIA RESTRICTIONS

Note: In *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387, the appellate court held that the statutory framework of Fam C §6389 denies the trial court the authority to effectively delete the firearm restriction. Family Code §6389 does not empower the court to disable or modify the firearms prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders. The only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed. [Because the language in CCP §527.9 was modeled after and generally mirrors the language in Fam C §6389, arguably the holding in *Ritchie v Konrad* applies to CCP §527.9.]

A. [§2.4] EMERGENCY PROTECTIVE ORDER (FAM C §§6240–6274)

It is unlawful for a person subject to an emergency protective order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. Pen C §29825(b); Fam C §6389(a).

A person subject to an emergency protective order under Pen C §646.91 cannot own, possess, purchase, or receive a firearm while the order is in effect. Pen C §646.91(n).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. Fam C §6389(a); CCP §§527.6, 527.8; Welf & I C §§213.5, 15657.03. Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

Before issuing an emergency protective order under Fam C §§6240 et seq, the on-call judge should ask the law enforcement officer who is requesting the order if the officer has asked the victim, alleged abuser, or both, whether a firearm is present at the location. Pen C §13730. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Procedures, page 23, #7.*

**B. [§2.5] FAMILY COURT—TEMPORARY RESTRAINING ORDER
(FAM C §§6200 ET SEQ)**

The court (through sheriff, court, or pretrial services) should conduct a firearms search on the proposed restrained person through the Automated Firearms System (AFS) or another appropriate database before issuing a restraining order (including a temporary restraining order). However, failure or inability to conduct the firearms search should not delay issuance of an order.

If firearms, whether registered or not, are reported to the court through an AFS database search or by the protected party, the court should so indicate on the temporary restraining order and order after hearing.

Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Civil Court Restraining Orders, page 24, #12 & #13.

It is unlawful for a person subject to a temporary restraining order to own, possess, purchase, or receive any firearms during the term of the protective order. Fam C §6389(a). A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. Pen C §29825(a); Fam C §6389(a), (c)(1), (2). Furthermore, the respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. Fam C §6389(a). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

On request of a law enforcement officer, the person subject to the temporary restraining order must immediately relinquish any firearm in that person's immediate possession or control to the control of the officer. A law enforcement officer serving a protective order that indicates that the respondent possesses weapons or ammunition shall request that the firearm be immediately surrendered. If no request is made by law enforcement, the person subject to the temporary restraining order, within 24 hours of being served with the order, must surrender the firearm to the control of local law enforcement or sell the firearm to or store it with a licensed gun dealer. The person must file a receipt with the court and with the law enforcement agency that served the order, showing that the firearm was surrendered to local law enforcement or sold to or stored with a licensed gun dealer within 48 hours after receiving the order. Fam C §6389(c)(2).

The Judicial Council must provide a notice on the protective order form that upon service of the order, the respondent will be ordered to

relinquish possession or control of any firearms and not purchase or receive or attempt to purchase or receive any firearms for the duration of the protective order. Fam C §6389(b).

The application forms for protective orders adopted by the Judicial Council must require the petitioner to describe the number, types, and locations of any firearms presently known by the petitioner to be possessed and controlled by the respondent. Fam C §6389(c)(3).

Note: A search warrant may be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under Fam C §6389. The person must have been lawfully served with the protective order and failed to relinquish the firearm as required by law. Pen C §1524(a)(11).

**C. [§2.6] FAMILY COURT—ORDER AFTER HEARING
(FAM C §§6300 ET SEQ)**

The court (through sheriff, court, or pretrial services) should conduct a firearms search on the proposed restrained person through AFS or another appropriate database before issuing a restraining order (including a temporary restraining order). However, failure or inability to conduct the firearms search should not delay issuance of an order.

If firearms, whether registered or not, are reported to the court through an AFS database search or by the protected party, the court should so indicate on the temporary restraining order and order after hearing.

The court shall inform parties of the terms of the restraining order, including notice that the restrained person is prohibited from owning, possessing, purchasing, receiving, or attempting to own, possess, purchase, or receive a firearm or ammunition, including notice of the penalty for violation. See Fam C §6304.

Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Civil Court Restraining Orders, page 24, #12, #13, & #14.

It is unlawful for a person subject to an Order After Hearing (CLETS) to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. Pen C §29825(a); Fam C §6389(a).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. Fam C §6389(a). Ammunition includes, but is not limited to, any bullet, cartridge,

magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

When both parties are present at a protective order proceeding, the court must inform both parties of the terms of the order, including the firearms and ammunition prohibitions and penalty for violation. Fam C §6304.

1. [§2.7] Relinquishment (Fam C §6389)

When a protective order is issued, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, immediately upon the request of a law enforcement officer, to the control of the officer, or if no request is made by law enforcement, within 24 hours of being served with the order. A law enforcement officer serving a protective order that indicates that the respondent possesses weapons or ammunition shall request that the firearm be immediately surrendered. Fam C §6389(c)(1), (2).

Note: If the respondent notifies the court that a firearm is not in his or her immediate possession, the court may limit the order to exclude that firearm if the judge is satisfied the respondent is unable to gain access to that firearm while the protective order is in effect. Fam C §6389(l).

To comply with the relinquishment order, the respondent may (Fam C §6389(c)):

- Sell the firearm to a licensed gun dealer;
- Store the firearm with a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

Note: Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. Fam C §6389(e).

The respondent must file a receipt of sale, storage, or surrender to the court and, effective January 1, 2013, with the law enforcement agency that served the order within 48 hours after receiving the order.

Exemptions:

- *Employment*—If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm, the court may grant an exemption from the relinquishment requirements. If the court grants this exemption, then the court must order that the firearm will be in the respondent's possession only during scheduled work hours and travel to and from work. Fam C §6389(h).

- *Peace Officer*—If carrying a firearm by a peace officer is necessary as a (1) condition of employment, and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. The court cannot make this finding until the officer has undergone a mandatory psychological evaluation as ordered by the court. The court may require the officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence. Fam C §6389(h).

If the respondent declines to relinquish any firearms by arguing a Fifth Amendment right against self-incrimination, the court may grant use immunity for the act of relinquishing the firearm. Fam C §6389(d).

Note: A search warrant may be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under Fam C §6389. The person must have been lawfully served with the protective order and failed to relinquish the firearm as required by law. Pen C §1524(a)(11).

[§2.7.1] Court Procedures: Firearm Relinquishment (Cal Rules of Ct 5.495)

Cal Rules of Ct 5.495, effective July 1, 2014, provides a procedure for courts issuing family and juvenile law domestic violence restraining orders to determine whether a restrained person has complied with the court's order to relinquish any prohibited firearms that the restrained person owns, possesses, or controls, as specified in Fam C §6389(c).

Consider relevant information at a noticed hearing and make determination. The court must consider relevant information, when presented at a noticed hearing, to determine whether the person subject to a family or juvenile law protective order has a prohibited firearm. The court may consider whether the restrained person filed a relinquishment, storage, or sales receipt or if an exemption from the firearms prohibition was granted under Fam C §6389(h). The court may make its determination at the time a domestic violence protective order is issued or at a subsequent noticed hearing while the order remains in effect. If the court makes a determination that the restrained person has a prohibited firearm, the court must make a written record of the determination and provide a copy to any party who is present at the hearing and, upon request, to any party not present at the hearing.

Discretionary review hearing. The court, in its discretion, may defer consideration of the information to a subsequent review hearing. If so, the rule specifies the timing of that hearing, requires the protected person to provide notice of the hearing either in person or by mail to the restrained person if that person was not present when the court set the review hearing, specifies who must be present at the review hearing, and provides that a party may appear by telephone at the review hearing under rule 5.9.

Remedies. The court may consider a determination that the restrained person has a firearm in violation of Family Code section 6389 in issuing an order to show cause for contempt or an order for money sanctions. The rule restates existing law on the safety and welfare of children and family members and recognizes the safety issues associated with the presence of prohibited firearms.

2. [§2.8] Expiration of Relinquishment Order

If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within five days after expiration of the order unless the law enforcement agency determines that (1) the firearm has been stolen; (2) the respondent is in a prohibited class for possession of firearms as defined in Chapter 2 (commencing with Section 29800) and Chapter 3 (commencing with Section 29900) of Division 9 of Title 4 of Part 6 of the Penal Code and Welf & I C §§8100 and 8103; or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to or store it with a licensed gun dealer. Fam C §6389(g), Pen C §29830.

D. [§2.9] JUVENILE COURT PROTECTIVE ORDER (WELF & I C §§213.5, 304, 362.4, 726.5)

It is unlawful for a person subject to a juvenile court protective order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. Pen C §29825(a), (b); Fam C §§6218, 6389(a).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. Fam C §6389(a). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

See Relinquishment in §§2.6 and 2.7.1 (Family Court Order After Hearing).

E. [§2.10] CRIMINAL PROTECTIVE ORDER (PEN C §136.2)

It is unlawful for a person subject to a criminal protective order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. Pen C §29825(a), (b).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

The court should orally advise the defendant about state and federal firearms and ammunition prohibitions and the requirement for timely relinquishment. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Procedures, page 23, #9.*

1. [§2.11] Relinquishment (CCP §527.9; Pen C §136.2(d))

After issuing a protective order, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, within 24 hours of being served with the order. CCP §527.9(a), (b). To comply with the relinquishment order, the respondent may (CCP §527.9(b), Pen C §29830):

- Sell the firearm to a licensed gun dealer;
- Store the firearm with a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

Note: Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. "Actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and surrendering possession of the firearm to a licensed dealer or to the person relinquishing the firearm. CCP §527.9(c).

The respondent must file a receipt of sale, storage, or surrender to the court within 48 hours after receiving the order. CCP §527.9(b).

Exemptions:

- *Employment*—If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm, the court may grant an exemption from

the relinquishment requirements. If the court grants this exemption, then the court must order that the firearm will be in the respondent's possession only during scheduled work hours and travel to and from work. CCP §527.9(f).

- *Peace Officer*—If carrying a firearm by a peace officer is necessary as a (1) condition of employment, and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. The court cannot make this finding until the officer has undergone a mandatory psychological evaluation as ordered by the court. The court may require the officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence. CCP §527.9(f).

If the court must continue a hearing because of a relinquishment request, the protective orders should be continued or the issue bifurcated and the protective order granted pending the hearing. CCP §527.9(b).

During the period of the relinquishment order, the respondent is entitled to make one sale of all firearms that are in the possession of local law enforcement. A licensed gun dealer, who presents a bill of sale, shall be given possession of those firearms, at the storage location, within five days of presentation of the bill of sale. CCP §527.9(g).

Any person who is prohibited from owning or possessing a firearm may transfer any firearm in his or her possession, or of which he or she is the owner, to a licensed firearms dealer, for storage during the duration of the prohibition, if the prohibition on owning or possessing the firearm will expire on a date specified in the court order. The firearms dealer must notify the DOJ of the date that the dealer took possession of the firearm. Pen C §29830.

The court should ask the prosecutor if he or she has reason to believe that the defendant owns or possesses a firearm or ammunition. If the court finds that there is reason to believe that the defendant owns or possesses a firearm or ammunition, the court should set a review hearing within 48 hours of service of the protective order on the defendant to determine whether a relinquishment or sales receipt was filed. CCP §527.9. The court may wish to set the review hearing within 24 hours of service when logistically feasible. The court should order the restrained person to personally appear at the review hearing unless a sale or relinquishment receipt is filed within the statutory time frame. If the restrained person indicates under oath that he or she no longer owns or possesses any firearms that are entered in his or her name in the AFS database, the court should order the restrained person to submit form FD 4036, *Notice of No Longer in Possession* (NLIP), to the DOJ. The court should order the restrained person to submit a report of an allegedly lost or stolen firearm to local law enforcement and present proof of the report to the court. When the court has reason to believe that the defendant still owns or possesses a firearm or ammunition, even if the restrained person has filed a receipt, NLIP, or other type of sale or relinquishment notice, the court should consider holding a review hearing.

If no receipt, NLIP, or other notice has been filed or provided and the defendant appears in court at the scheduled hearing, the court should hold a hearing on the firearms issue and (1) issue a search warrant if one is requested, provided the court finds probable cause, (2) increase bail, (3) revoke release on own recognizance, or (4) set a probation revocation hearing. If no receipt, NLIP, or other notice has been filed or provided and defendant does not appear for the court hearing, the court should issue a no-bail bench warrant.

Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Procedures, page 24, #10 & #11.

Firearms Relinquishment Procedures (Cal Rules of Ct 4.700)*Setting Review Hearing:*

At any hearing where the court issues a criminal protective order, the court must consider all credible information, including information provided on behalf of the defendant, to determine if there is good cause to believe that the defendant has a firearm within his or her immediate possession or control. Cal Rules of Ct 4.700(c)(1).

If the court finds good cause to believe that the defendant has a firearm within his or her immediate possession or control, the court must set a review hearing to ascertain whether the defendant has complied with the requirement to relinquish the firearm as specified in CCP §527.9. Unless the defendant is in custody at the time, the review hearing should occur within two court days after issuance of the criminal protective order. If circumstances warrant, the court may extend the review hearing to occur within five court days after issuance of the criminal protective order. The court must give the defendant an opportunity to present information at the review hearing to refute the allegation that he or she owns any firearms. If the defendant is in custody at the time the criminal protective order is issued, the court should order the defendant to appear for a review hearing within two court days after the defendant's release from custody. Cal Rules of Ct 4.700(c)(2).

If the proceeding is held under Pen C §136.2, the court may, under Pen C §977(a)(2), order the defendant to personally appear at the review hearing. If the proceeding is held under Pen C §1203.097, the court should order the defendant to personally appear. Cal Rules of Ct 4.700(c)(3).

Review Hearing:

If the court has issued a criminal protective order under Pen C §136.2, at the review hearing:

1. If the court finds that the defendant has a firearm in or subject to his or her immediate possession or control, the court must consider whether bail, as set, or defendant's release on own recognizance is appropriate. Cal Rules of Ct 4.700(d)(1)(A).
2. If the defendant does not appear at the hearing and the court orders that bail be revoked, the court should issue a bench warrant. Cal Rules of Ct 4.700(d)(1)(B).

If the criminal protective order is issued as a condition of probation under Pen C §1203.097, and the court finds at the review hearing that the defendant has a firearm in or subject to his or her immediate possession or control, the court must proceed under Pen C §1203.097(a)(12). Cal Rules of Ct 4.700(d)(2).

In any review hearing to determine whether a defendant has complied with the requirement to relinquish firearms as specified in CCP §527.9, the burden of proof is on the prosecution. Cal Rules of Ct 4.700(d)(3).

2. [§2.12] Expiration of Relinquishment Order

If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within five days after expiration of the protective order unless the law enforcement agency determines that (1) the firearm has been stolen; (2) the respondent is in a prohibited class for possession of firearms as defined in Chapter 2 (commencing with Section 29800) and Chapter 3 (commencing with Section 29900) of Division 9 of Title 4 of Part 6 of the Penal Code and Welf & I C §§8100 and 8103; or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to or store it with a licensed gun dealer. CCP §527.9(e), Pen C §29830.

F. [§2.13] WORKPLACE VIOLENCE PROTECTIVE ORDER (CCP §527.8)

It is unlawful for a person subject to a workplace violence protective order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. CCP §527.8(r)(1), (3); Pen C §29825(a), (b).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. CCP §527.8(r)(1), (3). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

See Relinquishment in §2.11. CCP §527.8(r)(2).

G. [§2.14] CIVIL HARASSMENT PROTECTIVE ORDER (CCP §527.6)

It is unlawful for a person subject to a civil harassment protective order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. CCP §527.6(t)(1), (3); Pen C §29825(a), (b).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. CCP §527.6(t)(1), (3). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

See Relinquishment in §2.11. CCP §527.6(t)(2).

**H. [§2.15] ELDER AND DEPENDENT ADULT PROTECTIVE ORDER
(WELF & I C §15657.03)**

It is unlawful for a person subject to an elder and dependent adult protective order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. Pen C §29825(a), (b); Welf & I C §15657.03(t)(1), (3).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. Welf & I C §15657.03(t)(1), (3). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

Note: The firearms and ammunition prohibitions do not apply to a case consisting solely of financial abuse unaccompanied by force, threat, harassment, intimidation, or any other form of abuse. Welf & I C §15657.03(t)(4).

See Relinquishment in §2.11. Welf & I C §15657.03(t)(2).

**I. [§2.16] PRIVATE POSTSECONDARY EDUCATIONAL INSTITUTION
PROTECTIVE ORDER (CCP §527.85)**

It is unlawful for a person subject to a private postsecondary educational institution protective order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. CCP §527.85(r)(1), (3); Pen C §29825(a), (b).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §30305(a)(1). The purchase or receipt of ammunition is also prohibited. CCP §527.85(r)(1), (3). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §16150(b).

See Relinquishment in §2.11. CCP §527.85(r)(2).

Chapter 3

FULL FAITH AND CREDIT

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1. [§3.8] Civilian Protective Order
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I. [§3.1] OVERVIEW

Victims of domestic violence often move from state to state for safety reasons. Historically, every move required an application for a new protective order, which was too burdensome and dangerous. As a result, Congress included a full faith and credit provision in the Violence Against Women Act (18 USC §2265).

The primary objective of this chapter is to provide California judicial officers with a full faith and credit reference guide. This chapter looks at the federal full faith and credit provision in the Violence Against Women Act and its application to civil protective orders, criminal protective orders, tribal protective orders, and military protective orders (MPOs). This chapter defines the issuing court's jurisdiction and the enforcing court's jurisdiction, provides the necessary guidance for creating orders that will be enforced across state or tribal lines, and ensures that victims of domestic violence receive the necessary protection their protective orders are designed to provide as they move into other jurisdictions. Appendix F contains resource information.

II. [§3.2] THE FEDERAL LAW

A valid protection order issued by a State, Indian tribe, or territory shall be given full faith and credit by another State, Indian tribe, or territory and enforced by the law enforcement personnel of the State, Indian tribal government, or territory as if it were the order of the enforcing State, Indian tribe, or territory. 18 USC §2265(a).

A valid protection order issued by a State, Indian tribe, or territory must meet the following conditions (18 USC §2265(b)):

- The issuing court has jurisdiction over the parties and matter (18 USC §2265(b)(1)); and
- The restrained party is given reasonable notice and opportunity to be heard sufficient to protect his or her due process rights. 18 USC §2265(b)(2).

If the order is ex parte, notice and opportunity to be heard must be provided within the time required by the issuing State, tribal, or territorial law, within a reasonable time after the order is issued, and sufficient to protect the restrained party's due process rights. 18 USC §2265(b)(2).

The term "protection order" includes (18 USC §2266(5)(A), (B)):

- Any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts, harassment, or sexual violence against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and
- Any support, child custody or visitation provisions, orders, remedies, or relief issued as part of a protection order, restraining order, or injunction under State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.

The term "state" includes (18 USC §2266(8)):

- A state of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States.

"Mutual orders"—A protective order issued against a person who has petitioned, filed a complaint, or filed a written pleading for protection

against abuse by a spouse or intimate partner is not entitled to full faith and credit if (18 USC §2265(c)):

- No cross or counter petition, complaint, or other written pleading was filed seeking a protection order (18 USC §2265(c)(1)); or
- A cross or counter petition has been filed, and the court did not make specific findings that each party was entitled to a protective order. 18 USC §2265(c)(2).

The term “spouse or intimate partner” includes (18 USC §2266(7)):

- A spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser (18 USC §2266(7)(A)(i)(I));
- A person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship (18 USC §2266(7)(A)(i)(II)); and
- Any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the state or tribal jurisdiction in which the injury occurred or where the victim resides. 18 USC §2266(7)(B).

“Notification to respondent”—A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order. 18 USC §2265(d)(1).

“Registration, domestication, or filing of foreign orders”—Registration or filing is not a prerequisite for enforcement. Failure to register or file under a State, tribal, or territorial requirement does not affect enforcement. The protective order shall be accorded full faith and credit. 18 USC §2265(d)(2).

A State, Indian tribe, or territory cannot make available publicly on the Internet any information regarding the registration; filing of a petition for; or issuance of a protection order, restraining order, or injunction in either the issuing or enforcing State, tribal, or territorial jurisdiction, if such publication would be likely to reveal the identity and location of the person protected by the order. A State, Indian tribe, or territory can share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes. 18 USC §2265(d)(3).

III. APPLICATION OF FEDERAL FULL FAITH AND CREDIT TO PROTECTIVE ORDERS

A. CIVIL PROTECTIVE ORDERS

1. [§3.3] Jurisdiction (18 USC §2265(a))

Issuing court—The issuing court sets the terms, conditions, and duration of the protective order under the laws of that State, Indian tribe, or territory.

TIP: Clear and specific orders will facilitate enforcement in other states.

TIP: Orally inform the parties that the protective order is enforceable in all jurisdictions and that violation of the order, in addition to any State, tribal, or territorial sanctions, may subject the respondent to federal prosecution for federal crimes such as firearms possession, interstate travel to commit domestic violence, interstate stalking, and interstate violation of a protective order.

Enforcing court—The enforcing court determines how the order is enforced and determines the penalties and sanctions for violation of the order under their State, tribal, or territorial law.

TIP: If there are questions regarding the validity of an order, communicate with the issuing court to resolve the issues.

Note: The enforcing court enforces the order as issued, even if the relief granted by the issuing court is unavailable under the laws of the enforcing court.

2. [§3.4] California Court as the Enforcing Court

In California, Fam C §6402 implements the federal full faith and credit provisions and sets forth enforcement procedures.

A foreign protective order is valid and enforceable in California if it meets all of the following criteria (Fam C §6402(d)):

- Identifies the protected party and the respondent.
- Is currently in effect.
- Is issued by a tribunal that has jurisdiction over the parties and subject matter under the law of the issuing state.
- Is issued after respondent is given reasonable notice and the respondent has an opportunity to be heard before the order is issued. If the order was ex parte, the respondent must have had

notice and opportunity to be heard within a reasonable time after the order was issued.

Note: Absence of any of the above criteria is an affirmative defense in an enforcement action. Fam C §6402(f).

The foreign protective order will be enforced under California laws. California will also enforce terms of a valid foreign protective order that a California tribunal would normally lack power to provide. Fam C §6402(a). Also, custody and visitation orders contained in the protective order will be enforced if the orders were issued in accordance with the jurisdictional requirements governing custody and visitation orders in the issuing state. Fam C §6402(c).

Enforcing custody/visitation orders in protective order. California courts shall accord full faith and credit to an order issued by another state and enforce a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so. Fam C §3453. See also Fam C §3443.

Under the Parental Kidnapping Prevention Act (PKPA), California must enforce the custody/visitation provisions provided by the issuing court in the protective order, as long as the issuing court meets the jurisdictional requirements set forth in the Act. 28 USC §1738A(a).

Protective order is silent on custody/visitation. California has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned, or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse. Fam C §3424(a).

Modifying custody/visitation in protective order. Generally, a court of this state may not modify a child custody determination made by a court of another state unless specified requirements are met. Fam C §3423. However, emergency jurisdiction, if applicable, does allow an order to be issued for a period of time that is deemed adequate for the person to obtain an order from the state having jurisdiction. Fam C §3424(c).

The PKPA contains an emergency jurisdiction provision consistent with the Uniform Child Custody Jurisdiction and Enforcement Act. 28 USC §1738A(c)(2)(C)(ii).

California cannot modify another state court custody order unless it has jurisdiction (which includes emergency), and the other state court no longer has jurisdiction or has declined to exercise jurisdiction to modify the custody order. 28 USC §1738A(f)(1)–(2). California cannot modify another state court visitation order unless the other state court no longer has jurisdiction or has declined to exercise jurisdiction to modify the visitation order. 28 USC §1738A(h).

Note: Interjurisdictional custody cases are complex. This bench handbook touches only briefly on the subject. For more information, please see the article, “Enforcing Child Custody Orders Across Jurisdictional Lines,” by Darren Mitchell, National Center on Full Faith and Credit. See Appendix D.

Child support in protection orders. The appropriate authorities of each state shall enforce a child support order made by a court of another state and shall not seek or make a modification of such an order unless the court has jurisdiction to make a child support order, or the other state court no longer has continuing exclusive jurisdiction. 28 USC §1738B (Federal Full Faith and Credit for Child Support Orders).

California has the Uniform Interstate Family Support Act, which implements the federal full faith and credit provisions and provides significant detail on establishing, enforcing, or modifying child support orders. Fam C §§4900–5005.

Provisions of a foreign mutual protective order favoring a respondent will be enforced in California only if (Fam C §6402(g)):

- The respondent filed a written pleading seeking a protective order in the issuing state.
- The tribunal in the issuing state made specific findings in favor of the respondent.

Foreign protective orders do not have to be registered in California. Fam C §6403(d). However, a person can request the court to register the order. This is often recommended so that the order can be entered into the domestic violence restraining order registry of the California Law Enforcement Telecommunications System (CLETS). The form to register and the filing of the registration is at no cost to the individual. After the foreign protective order is registered, it must be sealed, and access is allowed only to law enforcement, the person who registered the order on written request with proof of identification, the defense after arraignment on criminal charges involving an alleged violation of the order, or on further order of the court. Fam C §6404. See Judicial Council Form DV-600, Order to Register Out-of-State or Tribal Court Protective/Restraining Order).

Tribal court orders may be registered with any California superior court. Registering the order allows it to be entered into the domestic violence restraining order registry of CLETS. Fam C §6404. At the request of any tribal court located within a specified county, the superior court of that county must develop a written protocol to permit the faxing or electronic filing of any qualifying tribal court order. Cal Rules of Ct 5.386, 2.300. See JC Form DV-610, Fax Transmission Cover Sheet for Registration of Tribal Court Protective Order.

A tribunal of California may not enforce a foreign protective order if the tribunal of the issuing state does not recognize the standing of a protected individual to seek enforcement. Fam C §6402(b).

B. CRIMINAL PROTECTIVE ORDERS

1. [§3.5] Jurisdiction (18 USC §2265(a))

Issuing court—The issuing court sets the terms, conditions, and duration of the protective order under the laws of that state or tribe.

Enforcing court—The enforcing court determines how the order is enforced and determines the penalties or sanctions for violation of the order under their state or tribal law.

Note: The enforcing court enforces the order as issued, even if the relief granted by the issuing court is unavailable under the laws of the enforcing court.

2. [§3.6] California Court as the Enforcing Court

Arrest authority. A peace officer responding to a call alleging violation of a domestic violence protective or restraining order issued by the court of another state, tribe, or territory shall make a lawful warrantless arrest if the officer has probable cause to believe the restrained person has notice of the order and committed an act in violation of the order. Pen C §836(c)(1).

Violation of order. A person who willfully disobeys the written terms of any process or court order or out-of-state court order, lawfully issued by any court, including orders pending trial, is guilty of a misdemeanor. Pen C §166(a)(4).

C. [§3.7] TRIBAL PROTECTIVE ORDERS—JURISDICTION (18 USC §2265(a))

Issuing court—The issuing court sets the terms, conditions, and duration of the protective order under the laws of that state or tribe.

Enforcing court—The enforcing court determines how the order is enforced and determines the penalties or sanctions for violation of the order under their state or tribal law.

Tribal court jurisdiction—A tribal court has full civil jurisdiction to issue and enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe. 18 USC §2265(e).

Note: A tribe may ask the Attorney General for designation as a “participating tribe.” If so designated, the tribal court may exercise “special domestic violence criminal jurisdiction” over a defendant if the defendant resides in or is employed by the Indian Country of the

participating tribe, or is a spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian Country of the participating tribe. 25 USC §1304. Otherwise, in most cases, tribal police do not have the authority to arrest non-Indians, and tribal courts do not have criminal authority over non-Indians. See *Oliphant v Suquamish Indian Tribe* (1978) 435 US 191, 98 S Ct 1011, 55 L Ed 2d 209 (tribal governments have no criminal jurisdiction over non-Indians for violation of tribal law).

Note: The enforcing court enforces the order as issued, even if the relief granted by the issuing court is unavailable under the laws of the enforcing court.

D. MILITARY PROTECTIVE ORDERS

1. [§3.8] Civilian Protective Order

A civilian order of protection has the same force and effect on a military installation as the order would have within the jurisdiction of the issuing court. 10 USC §1561a.

Note: The Secretary of Defense prescribed regulations to carry out this section.

www.ncdsv.org/images/ImplementationArmedForcesDomesticSecurityAct.pdf

2. [§3.9] Military Protective Order

A military protective order is not subject to due process requirements; therefore, it is not considered a “valid” protective order under the federal full faith and credit provisions.

Note: The military protective order (MPO) is issued by the abuser’s commanding officer, often not in writing and enforceable at the discretion of the commander. Article 15, Uniform Code of Military Justice. The MPO is not enforceable by a civilian court, and it is not transferable.

<p>TIP: Jurisdictions with military installations may have established a Memorandum of Understanding (MOU) between the military installation and the civilian court system. For example, an MOU may address violation of an MPO off base and establish procedures for immediate notification of the base commander. One should contact the installation’s base commander regarding an existing MOU or when creating an MOU.</p>
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Note: The Department of Defense issued directive Number 6400.1, which directs all branches of the military on how to respond to domestic violence committed by or against active duty service members or their family members. Each military branch has created regulations that describe the application of this response to their service members. For further information, please go to the appropriate branch website: Army (www.army.mil), Air Force (www.af.mil), Navy (www.navy.mil), and Marines (www.usmc.mil).

APPENDIX A: FEDERAL AND CALIFORNIA FIREARMS RESTRICTIONS

RESTRICTION	FEDERAL	CALIFORNIA
Felony Conviction	<p>Person cannot transport, possess, or receive any firearm or ammunition. 18 USC §922(g)(1).</p> <p>Others cannot sell or dispose of firearms or ammunition to a person they knew or should have known is under felony indictment or conviction. 18 USC §922(d)(1).</p> <p>Exemptions: Yes 18 USC §925(a)(1).</p>	<p>Person cannot own, possess, or control any firearm. Pen C §29800(a)(1).</p> <p>Person cannot possess or control a firearm if he or she has a previous conviction for any offense listed in Pen C §23515(a), (b), (d).</p> <p>Exemptions: Yes Pen C §29850.</p>
Misdemeanor Conviction	<p>Person convicted of misdemeanor crime of domestic violence cannot transport, possess, or receive any firearm or ammunition. 18 USC §922(g)(9).</p> <p>Others cannot sell or dispose of firearms or ammunition to a person they knew or should have known was convicted of a misdemeanor crime of domestic violence. 18 USC §922(d)(9).</p> <p>Exemptions: No 18 USC §925(a)(1).</p>	<p>Person convicted of one or more misdemeanors, as enumerated in Pen C §29805, cannot own, purchase, receive, possess, or have in his or her custody or control, any firearm within 10 years of the conviction. Pen C §29805.</p> <p>Relief From Prohibitions: Yes Pen C §§29855, 29860.</p>

RESTRICTION	FEDERAL	CALIFORNIA
Condition of Probation	N/A	As an express condition of probation, a person can be prohibited from owning, possessing, controlling, receiving, or purchasing a firearm. Pen C §29815.
Juvenile Court	N/A	A person adjudged a ward of the court, who is alleged to have committed one of the offenses enumerated in Pen C §§1203.073(b), 29805, 25850, 25400(a), 26100(a) or Welf & I C §707(b), cannot own, possess, or have under his or her custody or control, any firearm until the age of 30. Pen C §29820.
Mental Health	<p>Person adjudicated as a mental defective or committed to any mental institution, cannot transport, possess, or receive any firearm or ammunition. 18 USC §922(g)(4).</p> <p>Others cannot sell or dispose of firearms or ammunition to a person they knew or should have known was adjudicated as a mental defective or had been committed to any mental institution. 18 USC §922(d)(4).</p> <p>Exemptions: Yes 18 USC §925(a)(1).</p>	<p>Person admitted to a facility and deemed a danger to self or others cannot purchase, receive, possess, or control any firearms. Welf & I C §8100(a).</p> <p>Person who communicates a serious threat of physical violence against a reasonably identifiable victim to a licensed psychotherapist cannot purchase, receive, possess, or control any firearms or other deadly weapons for five years. Welf & I C §8100(b)(1).</p> <p>Person adjudicated by a court of any state to be a danger to others or adjudicated to be a</p>

RESTRICTION	FEDERAL	CALIFORNIA
Mental Health (cont'd)		<p>mentally disordered sex offender, cannot purchase, receive, possess, or control any firearm or other deadly weapon. Welf & I C §8103(a)(1).</p> <p>Person found not guilty by reason of insanity of specified violent crimes cannot purchase, receive, possess, or control any firearm or other deadly weapon. Welf & I C §8103(b)(1).</p> <p>Person found not guilty by reason of insanity of any crime not specified in Welf & I C §8103(b) cannot purchase, receive, possess, or control any firearm or other deadly weapon unless the court of commitment has found the person to have recovered sanity, under Pen C §1026.2 or the law of any other state or the United States. Welf & I C §8103(c)(1).</p> <p>Person found mentally incompetent to stand trial cannot purchase, receive, possess, or control any firearm or other deadly weapon unless there has been a finding that the person has been restored to competence to stand trial by the committing court. Welf & I C §8103(d)(1).</p>

RESTRICTION	FEDERAL	CALIFORNIA
Mental Health (cont'd)		<p>Person placed under conservatorship due to a mental disorder or impairment by chronic alcoholism cannot purchase, receive, possess, or control any firearm or other deadly weapon if the court that imposed the conservatorship found that possession of a firearm or any other deadly weapon by the person would present a danger to self or others. Welf & I C §8103(e)(1).</p> <p>Person taken into custody under Welf & I C §5150, assessed and admitted because of danger to self or others, cannot purchase, receive, possess, or control any firearm or other deadly weapon for five years after release from facility if prosecutor shows by preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner. Welf & I C §8103(f)(1), (6).</p> <p>Person certified for intensive treatment under Welf & I C §§5250, 5260, 5270.15 cannot purchase, receive, own, possess, or control any firearm for a five-year period. Welf & I C §8103(g)(1).</p>

RESTRICTION	FEDERAL	CALIFORNIA
Mental Health (cont'd)		Relief From Prohibitions: Yes, for specified sections only: Welf & I C §§8100(b)(3), 8103(a)(1), (f)(1), (3), (5), (g)(1), (4)
Protective Order	<p>Person subject to qualifying court order cannot possess or receive any firearm or ammunition. 18 USC §922(g)(8).</p> <p>Others cannot sell or dispose of firearms or ammunition to a person they knew or should have known was subject to a court order. 18 USC §922(d)(8).</p> <p>Exemptions: Yes 18 USC §925(a)(1).</p>	<p>Person subject to emergency protective order (Fam C §§6250 et seq, 6389(a); Pen C §646.91), Family Court—Temporary Restraining Order (TRO) (Fam C §§6218, 6389(a)), Family Court—Order After Hearing (OAH) (Fam C §§6218, 6389(a)), juvenile court protective order (Fam C §§6218, 6389(a)), criminal protective order (Pen C §136.2(d)), workplace violence protective order (CCP §527.8), civil harassment protective order (CCP §527.6), private postsecondary educational institution protective order (CCP §527.85), or elder and dependent adult protective order (Welf & I C §15657.03) cannot own, possess, purchase, receive, or attempt to purchase or receive any firearms or ammunition during the term of the protective order unless order was issued solely to restrain financial abuse. Welf & I C §15657.03(t)(4).</p>

RESTRICTION	FEDERAL	CALIFORNIA
Protective Order (cont'd)		Relief From Prohibitions: Yes Fam C §6389(h); CCP §527.9(f).

**APPENDIX B:
PROTECTION ORDERS AND FEDERAL FIREARMS
PROHIBITIONS; MISDEMEANOR CRIMES OF
DOMESTIC VIOLENCE AND FEDERAL FIREARMS
PROHIBITIONS; FEDERAL FIREARMS PROHIBITION
UNDER 18 U.S.C. §922(g)(4) PERSONS ADJUDICATED
AS A MENTAL DEFECTIVE OR COMMITTED TO A
MENTAL INSTITUTION;
DANGER ASSESSMENT TOOL**

www.atf.gov/files/publications/download/i/atf-i-3310-2.pdf

www.atf.gov/files/publications/download/i/atf-i-3310-3.pdf

www.atf.gov/files/publications/download/i/atf-i-3310-4.pdf

www.dangerassessment.org/About.aspx

APPENDIX C
FIREARMS AND DOMESTIC VIOLENCE:
A Primer for Judges

By Darren Mitchell and Susan B. Carbon

<http://aja.ncsc.dni.us/courtrv/cr39-2/CR39-2MitchellCarbon.pdf>

APPENDIX D

Department of Justice Forms and Judge's Firearms Checklist

Power of Attorney Form and Power of Attorney for Firearms and Disposal—Declaration Pen C §29810

<http://ag.ca.gov/firearms/forms/pdf/sb950frm1107.pdf>

Judge's Firearms Checklist

[www.fullfaithandcredit.org/files/bwjp/files/Firearm Checklist Judges
Final April 2012.pdf](http://www.fullfaithandcredit.org/files/bwjp/files/Firearm_Checklist_Judges_Final_April_2012.pdf)

APPENDIX E: RESOURCES

National Council of Juvenile and Family Court Judges (Family Violence Department)
(775) 784-6012
www.ncjfcj.org/

National Center on Protection Orders and Full Faith and Credit
800-903-0111, prompt 2
www.bwjp.org/ncffc_home.aspx

Battered Women's Justice Project
800-903-0111 x1
www.bwjp.org

United States Department of Justice, Office on Violence Against Women
202-307-6026
www.usdoj.gov/ovw

American Indian Law Center
505-277-5462
www.aile-inc.org

American Bar Association, Commission on Domestic and Sexual Violence
202-662-1744
www.abanet.org/domviol/home.html

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UNITED STATES

CONSTITUTION

Amend II: §§1.6, 2.1
 Amend V: §§2.1, 2.7
 Amend VIII: §1.6
 Amend X: §§1.6, 2.1

UNITED STATES CODE**Title 10**

1561a: §3.8

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