EIGHTH JUDICIAL DISTRICT COURT
FAMILY DIVISION

REGIONAL JUSTICE CENTER
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LAS VEGAS, NEVADA 89155

T. ARTHUR RITCHIE, JR.
CHIEF DISTRICT JUDGE

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May 27, 2010

Justice James Hardesty
Nevada Supreme Court
201 South Carson Street
Carson City, Nevada 89701

Re: Access to Records Regarding Domestic Violence and Temporary Protection Orders (ADKT No. 410)

Dear Justice Hardesty, Honorable Supreme Court Justices, and Commission Members:

This letter is written in response to the Order Scheduling Public Hearing and Allowing Public Comment filed on April 1, 2010 in ADKT No. 410. After receiving the order, the Eighth Judicial District Court formed a committee to prepare a report offering input to the Commission concerning the specific issues of access, confidentiality, sealing, and retention of court records in TPO and domestic violence cases. The committee consisted of the Domestic Violence Commissioners, and representatives from the Family Violence Intervention Center, the court clerk's office, and court administration. Their report, which is delivered with this letter, is submitted for the Eighth Judicial District Court.

We appreciate this opportunity to provide input regarding this important issue. If the district court may provide any additional information or assistance, please feel free to contact my office. Thank you for your consideration.

Sincerely,

T. Arthur Ritchie, Jr.
Chief Judge

cc: Tracie K. Lindeman, Clerk of the Supreme Court
Encls. as stated

10-34211

Eighth Judicial District Court/ Family Division Report

(1) The current Record Retention Manual only addresses domestic violence TPO's, and states that restraining orders issued in domestic relations cases under NRS 33.020 are to be retained up to two years after expiration of order. There is no general standard for the five other types of TPO's. Should the Supreme Court adopt rules governing the retention of records in all types of TPO's?

Yes, since protection order subtypes may be used interchangeably, all subtypes should be treated similarly. A victim or the parent or guardian of a victim of sexual assault may apply for a protection order under NRS 200.378 and NRS 33.020, or, if a victim is a minor, NRS 33.400 too. The protection is intended to be similar, so the procedural handling should be the same. A party should not knowingly or unknowingly have the documents pertaining to his or her litigation be treated differently merely due to the subtype of case that is filed, or because of the courthouse in which the application was made.

Maintaining similar retention standards will foster clarity for the Clerk of the Courts in each jurisdiction. Training of all deputy clerks, regardless of their physical location, will be streamlined. In the larger jurisdictions, the Clerk's Offices are not necessarily housed in the same building, yet deputy clerks may be assigned between and amongst the various offices in times of need. Consistent rules should ensure consistent results in information provided and treatment of documents.

It is common for the same litigants to file for protection orders against each other over and over again. In the Eighth Judicial District Court (hereinafter "EJDC") this can be a forum shopping ploy. It is often important to be able to view the total litigation picture of parties, especially when families are involved. Therefore, either the minimum records retention for cases filed in district courts should be followed, or in an effort to standardize all protection order subtypes, seven years should be the *minimum* retention period.[1]

The position of the EJDC is to request uniformity across the board on all protection order subtypes.

(1) Confidential information sheets are used in some courts in Nevada; however, there does not appear to be explicit authority to use a "confidential" information sheet or prevent access to information contained in these forms.

[1] Seven years was chosen because this period of time corresponds with the majority of the sealing of conviction time frames, and it specifically covers domestic violence convictions, with a few exceptions. See NRS 179.245(e). For additional information, please see the response to 8 below.

Nevada Criminal Justice Information System (NCJIS). The repository fields request identifying information, including social security number, height, weight, and hair and eye color. This information is not and should not be contained in the application; therefore, personal identifiers are kept as an internal working document called the confidential information sheet.

Currently, the confidential information sheet is kept in the Family Violence Intervention Program office, and it is not considered to be part of the file. It is an internal working document. Each sheet is kept for at least one year after the application is filed; it is then destroyed by shredding. The Sheriff's instruction sheet, which is generated from the content of the information sheet, is shredded when the Sheriff's Office delivers the return of service filing with the Clerk of Courts.

(2) **There is no procedure for a TPO applicant to submit exhibits under seal. Although the rules adopted by the Supreme Court regarding the sealing and redacting of court records apply to civil cases, it is not clear whether, and to what extent, those rules will apply to TPO cases.**

At a bare minimum, rules need to be adopted to deal with the exhibits which might be presented as attachments to a protection order application or for review during a court proceeding. Sealing exhibit rules should apply to anything that is attached to any moving document in a protection order case; it is assumed that referencing only attachments to an application was an oversight by the Court.

The EJDC has seen: pornographic photos; medical records; mental health treatment protocols; soiled garments; drug paraphernalia; employment records; and copies of identification cards filed or presented as exhibits to the court as part of a protection order proceeding. Many times, these items have no probative value as to whether an act of domestic violence has occurred or is likely to occur. Instead, they have been filed or presented for their harassment value or to sully the name and character of a party to the action. The bottom line is that these exhibits, if left for public viewing, have a lasting impression to all that view them.

Additionally, and even more troubling, is information that is submitted as attachments or exhibits that reference or pertain to third parties that are not a party to the proceeding. These third persons have no idea information pertaining to them has been filed in a public document, and the third person's reputation may be affected by these unknown filings.

(3) **There appears to be no authority to maintain the entire TPO file "presumptively confidential," with access to the media and general public only available upon order of the judge. Should the Supreme Court adopt rules governing public access to TPO files?**

Yes. In addition to the information provided in item 3 above, the EJDC would like to see all documents filed in an application for a protection order be maintained as confidential. The fact that a case has been filed should be public record: meaning the case caption and protection order subtype should be revealed upon request.[2] The treatment of all protection order subtypes should be similar to NRS 125.110. It has been established that there are only certain portions of domestic cases which need to be open to public examination: those portions which the public may have a legitimate interest in knowing. Due to the fact that a protection order application is equivalent to a complaint and motion all in one (initiation of an action and request for immediate relief) and contains factual allegations from a subjective viewpoint, it should be blocked from public view absent a court order. Protection order cases do not statutorily require the adverse party to file a responsive pleading or document before relief can be granted. In fact, the entire matter may be heard on its merits without an adverse party ever filing a document. Therefore, the written record is often skewed. An untrained legal eye would not necessarily realize this fact and jump to conclusions.

As discussed throughout this position letter, the application and most, if not all, of the documents, with the exception of a court order, contain inflammatory information. Often, documents filed in a protection order case contain venting statements, subjective statements, and exaggerated statements. The court does not, even at an extension hearing or an evidentiary hearing, go through each and every allegation made in an application or supporting exhibit to make findings or strike the allegations (a person's cause of action). It is noteworthy to know that some applications have narratives which exceed filing limits on Supreme Court briefs. Therefore, even if the court decides to extend a protection order, each and every alleged act of domestic violence has not been proven.

Additionally, the burden of proof that must be found to grant and extend a protection order is very low. In fact, in EDCR 5.22(b), the burden has been defined as "to the satisfaction of the court." This has been determined to be akin to, or arguably lesser than, a probable cause standard. Therefore, extra protections on what is open for public view might be warranted.

Domestic violence should not be swept aside or hidden; however, it must be remembered that it is a very private crime, and arrests are not readily made in a majority of those cases where a protection order is sought. The shame and humiliation attached to being a victim, or the child in a hostile home, are hard to shed. Neither the public, the media, nor data collectors need to know what happened at the next-door neighbor's house last night. Only if that neighbor's

[2] Protection orders filed pursuant to NRS 200.378 may have even less disclosure of an applicant's identity due to statutory identity safeguards.

personal safety is at imminent risk does the public arguably have a right to know.

Therefore, as long as the information is not published on an electronic format, and is not readily assembled to be published to an electronic format, it is believed that the case caption, as well as any resulting protection order should be public record.[3] Any documents which are filed or lodged with the court should be confidential, subject to viewing by the public upon an order of the judge.

(4) Some courts are questioning whether TPO records can be made "quasi-public," by, for example, restricting electronic access entirely via the Internet, but allowing physical TPO files to be inspected. Should the Supreme Court adopt rules concerning electronic access to TPO files?

Yes. 18 U.S.C. section 2265(d)(3) (for convenience referred to as "VAWA") limits internet publication of protection orders when doing so is likely to reveal the identity or location of an individual protected by the order.[4] However, the sharing of this information is permitted in a secure format amongst government agencies for law enforcement purposes.

While certain civil records may be readily available on the internet, those which identify domestic violence victims and affected children should not be. Third parties, such as landlords, employers, financial institutions, and potential creditors may use these filings against the parties involved. The mere existence of a filing may wrongfully ruin the reputation of the named litigant. Also, data brokering is proliferating, and there is no limitation or quality control on how the data is reported once it has hit the internet. The private interests involved in the most intimate details of a person's life should not be publicized on the internet.

The EJDC's quality controls of the information that may become part of a protection order request, and thereby the public domain, are not present.[5] The Courts must be mindful of the possibility of chilling effects, if the information is readily available via the internet and the manner in which it is used cannot be controlled, then applicants in need may not seek assistance.

The private interests in protection order cases outweigh the public's need for convenience to access these records. The identity of victims and affected children of domestic violence should not be available via electronic means.

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[3] See the answer to 5.

[4] VAWA defines protection orders to include: ". . . any injunction, restraining order, or any other order issued . . . for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person . . . ." 18 U.S.C. 2266(5).

[5] In 2009, 8,411 domestic violence protection order applications were filed in the EJDC. The personnel currently assigned in the FVIP office and the Clerk's Office are not able to adequately keep personal information, or suspect documents, from being filed by the litigants in the 8,411 cases.

Likewise, clear policies that would allow in-person inspection should be devised, so that documents are not scanned or copied at the Clerk's Office and then uploaded to the internet.

(5) **TPO files sometimes contain police reports and other exhibits that include social security numbers and other personal information. Frequently, litigants fail to redact this information. How should access to these types of records be handled by the courts?**

Please see numbers 3 and 4 above. At a minimum, redaction of information that would lead to identity theft should be implemented; however, given the volume of filings it is not possible for the EJDC to police the documents for personal identifiers.

(6) **TPO files sometimes contain graphic photographs depicting serious physical abuse or nudity. Should the Supreme Court adopt a procedure to limit access to these types of exhibits?**

Please see numbers 3 and 4 above.

(7) **There appears to be no provision in the law to allow a TPO case to be sealed or expunged. Although such authority exists for criminal cases, Senate Bill 398 (SB 398), providing similar authority for TPO's, was rejected in 2003. SB 398 would have authorized the adverse party to a temporary or extended protection order to request the order be sealed five years after the date of expiration or rescission of the order. Since protection orders are civil orders, the provisions of NRS 179.245 governing sealing of criminal records do not necessarily apply.**

Protection order cases should be expunged similar to criminal cases. There can be a social stigma that follows from the filing of a protection order, whether you are the named applicant or the adverse party. As has been previously discussed, the type of information that is contained in the application narrative, as well as any attachments or exhibits, is unfiltered. Factually accurate and inaccurate information is contained in protection order filings. Information completely unrelated to the issue at hand is often included in the filed documents. As has been noted, police reports and court records (transcripts, index pages, and minutes) of criminal cases which may have already been expunged or are eligible to be expunged in the future will remain as a public record.

Events that occurred in a tumultuous relationship, especially when a participant has not had any subsequent problems, should not remain as permanent marks on a person's character. Lessons are learned, and people do move on, except for the fact that a court case may exist forever. Bankruptcies are deleted from a credit history, criminal records can be expunged, and items

checked out from a public library are confidential,[6] yet an individual's most intimate and personal events are forever available for review. It must be remembered that not every protection order case is filed in good faith and for the purposes of security and protection.

The second component of expungement goes to those records kept by the Court. It has been reported that based upon the case management database being used by the EJDC, cases will continue to exist in the computer's back-up storage, even if they are not available for public viewing.

The EJDC suggests that either party may petition the court to have a file expunged five years after the date of dissolution or expiration of an issued protection order. In cases where an order was not issued, the period would run from the date the application was filed with the Clerk of Courts. If the request to expunge is denied by the judge, the Court's minimum record retention would control regarding access to the case information.

(8) **In 2009, Assembly Bill 120 (AB 120) was passed allowing victims of sexual assault to apply for a protection order. NRS 200.377 and 200.3773 require confidentiality of the protection order application and the process therein. However, section 3(1)(a) and (b) of AB 120 may make the enforcement of a sexual assault protection order problematic. Because this section of AB 120 appears to conflict with the confidentiality provisions of NRS 200.377 and 200.2773, the Standardized Protection Order Committee recommends that the applicant be:**

a) **allowed to waive confidentiality when applying for a sexual protection order, or;**

b) **allowed to use a pseudonym with disclosure to a person other than those persons delineated in NRS 200.3773(a)-(d) subject to court order following a hearing.**

The EDJC will defer this inquiry to the LVJC, since all sexual assault protection orders filed pursuant to NRS 200.378 are maintained and heard there.

[6] See NRS 239.013.