

Testimony of Nancy E. Hart, Esq.

Commission on Preservation, Access and Sealing of Court Records
Public Hearing on Access to Protection Order Files
Nevada Supreme Court
June 3, 2010

FILED

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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

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Good morning, my name is Nancy Hart and I work with the Nevada Network Against Domestic Violence on policy issues involved in domestic violence. I'm here to provide some input on the specific questions posed in the Court's order that scheduled this public hearing.

I would like to emphasize that my testimony is focused on policy considerations. I am not an active practitioner in the court system, but I have been involved in domestic violence policy work for almost 20 years.

1. Should the Supreme Court adopt rules governing the retention of records in all types of protection orders?

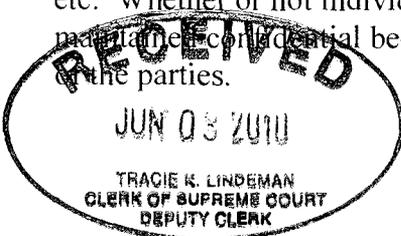
Yes, and the rule for protection orders should be that they are retained indefinitely. The rule for protection orders (POs) in the now outdated Record Retention Manual provided for retention for only two years after expiration. We believe that all POs should be retained indefinitely, in hard copy form. If that is not practicable, then at least an electronic copy should be retained in the court's computer system.

The record of a protection order can provide vital information about domestic violence or other criminal behavior that could be relevant in subsequent civil and criminal proceedings. It can be an important source of history of domestic violence and other criminal conduct.

2. Confidential information sheets – do courts need explicit authority to use or prevent access to the information in such forms?

All courts should have the ability to maintain some documents as "confidential". These documents should be kept separate from the non-confidential parts of the file, and should not be accessible by the public and/or media. There should be court procedures in place to ensure that confidential documents are kept secure and not made available to the public or the media. There should be absolutely no electronic or hard copy availability of confidential records.

The Ad Hoc Committee to Standardize Protection Order Forms, appointed by the Supreme Court, developed and adopted a "confidential information sheet" for use by law enforcement. The form contains information useful to law enforcement in the service of the PO – e.g., unique identifying features of the adverse party, whether the adverse party is likely to have weapons, etc. Whether or not individual courts utilize these sheets in the same way, the sheets should be maintained confidential because they contain confidential information that identifies one or both of the parties.



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3. Do (or should) the Supreme Court rules regarding the sealing and redacting of court records in civil cases also apply to TPO cases?

Exhibits and other documents in protection order cases should be able to be sealed, whether according to the provisions of Rule 1 of Part VII of the Supreme Courts concerning other civil cases, or pursuant to a similar rule.

4. Should the Supreme Court adopt rules governing public access to TPO files?

We are not advocating that TPO files should be considered “presumptively confidential”, with access to the media and general public only available upon a judge’s order. We understand and accept that TPO files should be accessible to the public and the media at the clerk’s office.

However, while protection orders are in the public record, they certainly can contain confidential or sensitive information which should be able to be sealed within the file.

5. Should the Supreme Court adopt rules concerning electronic access to TPO files?

Yes, absolutely, the Supreme Court should adopt a rule that no protection order is to be published or posted electronically (i.e., to the internet); no TPO file should be accessible via the internet by the public or the media.

This public policy is supported and, in fact, required by the federal Violence Against Women Act, which prohibits a state, Indian tribe or territory from “mak[ing] available on the Internet any information regarding the registration or filing of a protection order.” 18 U.S.C. 2265(d). Under the federal definition of “protection order”, all Nevada POs should be covered by this policy.

At least in Washoe and Clark Counties, TPOs can be e-filed so there is no longer a hard copy file. Instead, these electronic files are housed in computers in court clerks’ offices and should be available to the public the same as hard copy files would be. That is, a member of the public would have to go to the clerk’s office and review the electronic files while sitting at a terminal in the clerk’s office. With e-filing, the only remote computer access to electronic files should be attorneys of record who can currently access documents filed electronically in one of their cases.

6. How should police reports and other exhibits that include SSNs and other personal information be handled by the courts?

To the extent that police reports and other exhibits contain personal information, these documents should be considered confidential. As stated previously re. question number 2, all courts should have the ability to maintain some documents as “confidential”. These documents should be kept separate from the non-confidential parts of the file, and not accessible by the public and/or media. Again, there should be court procedures in place to ensure that confidential documents are kept secure and not made available to the public/media. Also, there should be absolutely no electronic or hard copy availability of confidential records.

This question notes that some litigants fail to redact personal information from documents that they file with the court. To the extent that clerks notice litigants submitting documents containing personal information, the clerks should place such docs in the confidential section of the file (or redact, or ask the parties to redact, the confidential information). Under no circumstances should documents containing confidential information be published or posted to the internet. As long as there is a rule that POs are not to be accessible electronically by the public/media (i.e., on the internet), this procedure should reduce the concerns about un-redacted exhibits, and be simple to follow.

7. Should the Supreme Court adopt a procedure to limit access to graphic photographs depicting serious physical abuse or nudity or similar types of exhibits?

If graphic photos or similar types of exhibits fit the criteria for confidential records, then they should be sealable the same as other confidential exhibits. Certainly if the identity of the person in the photo can be determined from the photo, then the photo should be held confidential.

8. Should TPO cases be able to be sealed or expunged?

No, we believe that protection order files should remain unsealed. As noted previously, however, specific exhibits and documents in the file should be able to be sealed based on their being confidential.

Protection order cases should not be sealed because they may be the basis for subsequent family law matters (e.g., to raise a presumption against joint custody) or other civil proceedings (e.g., as a defense to an eviction). Protection order files can also be relevant in immigration matters including the issuance of visas. Additionally, protection order files can provide an important source of history of DV or other criminal conduct that could be relevant in subsequent criminal proceedings.

If there are allegations of false statements in TPO cases, then there should be a process for addressing that issue before the court and for that information to be included in the file.

9. Should an applicant for an applicant for a sexual assault PO be allowed to waive confidentiality when applying for an order or, in the alternative, be 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?

As this is not in my area of expertise, I do not have specific responses to this question. We do have concerns about requiring any victims to waive confidentiality prior to applying for any protection order, but we are unclear about the complications that arise if an order is issued under a pseudonym. We understand that others with more expertise on this issue are here to testify.