

Red Flag Orders

by Tom King

Our current take on the new red-flag law follows:

We are here to help. You will need a lawyer. You should request a lawyer if one has not been appointed. Have your attorney contact us immediately by using the legal portal on our webpage. We cannot give you legal advice but we will assist your attorney. If you do not have an attorney and one has not been appointed for you, we will try to help you locate an attorney.

Extreme Risk Protection Orders are now law in New York. A copy of the law is linked below. It is poorly written, contradicting itself and other laws in New York. Judges have discretion on how to handle these cases and it is not unreasonable to expect variations from county to county. It is also important to remember that the facts of each case vary. Therefore, for those reasons and because I am not a lawyer, neither I nor the State Association can give you legal advice.

Here's what we can tell you: We are here to help. You will need a lawyer. The law states that the person served with a temporary extreme risk protection order (TERPO) should consult an attorney "promptly." *It does not state that the Court issuing the TERPO is going to appoint an attorney for you.* You will need to hire your own attorney. In certain cases, *you may be entitled to an attorney*, if, for example, you are mentally hygiene arrested, or if you are charged with a crime as part of this process.

This is a civil procedure, not a criminal procedure. A TERPO, like an order of protection, advises you that the court has found "probable cause" to believe you "are likely to engage in conduct that would result in serious harm to himself, herself or others." The standard is set under the mental hygiene law. The order served on you will notify you that you cannot purchase or possess, or attempt to purchase or possess any firearm, rifle or shotgun while the order is in effect and that you shall promptly surrender any firearm, rifle or shotgun. The procedure for surrender refers in part to the criminal procedure law's process for surrender of firearms for cases of orders of protection, by specifying in the order itself the place where such firearms, rifles or shotguns shall be surrendered, specifying the date and time by which the surrender shall be completed.

Important to note that the ERPO new law also states that the law enforcement officer serving the TERPO shall "request" the immediate surrender to the officer of all firearms, rifles and shotguns in your possession, and "the officer shall conduct any search permitted by law for such firearms. The law enforcement officer shall take possession of all firearms, rifles and shotguns *that are surrendered, that are in plain sight, or that are discovered pursuant to a legal search.* As part of the order, the court may also direct a police officer to search for firearms, rifles, and shotguns in the respondent's possession in a manner consistent with the

procedures of article six hundred ninety of the criminal procedure law."

As stated earlier, this law is poorly written, contradicting itself and other laws in New York. And here is one major concern: Article 630 of the Criminal Procedure Law describes the process of obtaining search warrants. They are issued by criminal courts. The courts issuing the TERPO are not criminal courts. Therefore, it appears that the ERPO language underlined above attempts to bypass the criminal procedure law requiring a search warrant by directing the law enforcement officer to search for firearms. It is our position that: 1. This is a serious fourth amendment violation; 2. A civil court lacks authority to issue a search warrant; and 3. Any statute attempting to bypass fourth amendment rights is unconstitutional. *Know your fourth amendment rights.*

Remember that the place to vindicate your rights is in the courtroom. If law enforcement comes to your door for any reason, and you are given an order not to handle your firearm or to put down your firearm, you should comply. If you don't you may be shot. Don't make the case for them that you are a danger to yourself or others by handling your firearm under these circumstances. ■