



Michigan Supreme Court

State Court Administrative Office

Field Services Division

Michigan Hall of Justice

P.O. Box 30048

Lansing, Michigan 48909

Phone (517) 373-4835

Ryan P. Gamby
Field Services Director

Extreme Risk Protection Order Act Q&A

March 8, 2024

Petitioners

Q: In Michigan, are probation officers considered law enforcement officers and able to petition for an extreme risk protection order (ERPO)?

A: No, probation officers are not considered law enforcement officers for the purposes of the ERPO Act. Under the ERPO Act, “law enforcement officer” means a law enforcement officer as that term is defined in MCL 28.602. [MCL 28.602\(f\)](#), in turn, provides an extensive definition of “law enforcement officer;” however, it does not include probation officers.

Complaint

Q: MCL 691.1807(1) lists factors the court must consider in determining whether to issue an ERPO. Based on the various types of petitioners, how will the court obtain this information to assist in reviewing the request?

A: [MCR 3.716\(B\)\(3\)](#) requires an ERPO complaint include facts that address the factors in [MCL 691.1807\(1\)](#) that the court must consider when determining whether to issue an ERPO. To assist with this, the ERPO complaint ([CC 452, Complaint for Extreme Risk Protection Order, Adult Respondent](#); [CC 452M, Complaint for Extreme Risk Protection Order, Minor Respondent](#)) contains sections for each factor identified in MCL 691.1807(1). The factors are written in plain language and are posed in the form of questions for the petitioner to answer.

Q: What term should be used for the parties in ERPO actions—plaintiff/defendant or petitioner/respondent?

A: The parties in an ERPO action are referred to as the petitioner and respondent. See [MCL 691.1803\(i\) and \(k\)](#); [MCR 3.715\(7\) and \(9\)](#).

Hearing

Q: Does the court (or court staff) need to complete their own investigation when reviewing the factors under MCL 691.1807(1)? Many petitioners may not have all the information necessary for the court to make an informed decision.

A: No, the court need not complete their own investigation of the factors contained in [MCL 691.1807\(1\)](#), but does need to determine whether the burden is met. An ERPO action is still an adversarial proceeding and the petitioner carries the burden of proving, by a preponderance of the evidence, that an ERPO is necessary. [MCR 3.718\(D\)\(6\)](#).

Orders

Q: If the court refuses to grant an ex parte order, how long does the petitioner have to request a hearing?

A: The petitioner must request a hearing within *21 days* of the court's order denying an ex parte order. [MCR 3.718\(A\)\(5\)](#). If the petitioner does not request a hearing within this timeframe, the order denying the complaint is final. *Id.*

Q: If ordering the immediate surrender of firearms, how should the court draft the order if the respondent's firearms are located in multiple jurisdictions? Should two orders be issued and directed to different law enforcement agencies?

A: No, the court should *not* enter two orders directed to different law enforcement agencies. [MCL 691.1809\(1\)\(g\)](#) requires an ERPO to designate a law enforcement agency that is responsible for forwarding the order to the FBI and entering the information into LEIN. This must be a law enforcement agency within whose jurisdiction the respondent resides. *Id.* Additionally, if the court orders the respondent to immediately surrender their firearms, the ERPO also must designate this law enforcement agency to seize the firearms after service and after giving the respondent an opportunity to surrender the guns. [MCL 691.1809\(1\)\(l\)](#).

Given their statewide jurisdiction, it might be prudent to designate the Michigan State Police in situations where firearms are located in multiple jurisdictions rather than the local police department or county sheriff. The definition of "law enforcement agency" includes the Michigan State Police for the purposes of ERPO actions. [MCL 691.1803\(g\)\(ii\)](#). As always, this is a good question to discuss with law enforcement agencies before the situation arises.

Q: How does the court know which law enforcement agency to designate in the order?

A: [MCL 691.1809\(1\)\(g\)](#) states the law enforcement agency designated in the order must be

the agency within whose jurisdiction the respondent resides.

Q: Can courts order the removal of firearms in a household because the child is a threat? Does the threat have to be from the person who owns the firearms?

A: The ERPO must order the respondent to surrender any firearms in the respondent's "possession or control." [MCL 691.1809\(1\)\(c\)](#). Possession or control includes, but is not limited to, "actual possession or constructive possession by which the individual has the right to control the firearm, even though the firearm is in a different location than the individual. Possession or control does not require the individual to own the firearm." [MCL 691.1803\(j\)](#).

Additionally, subject to [MCL 691.1815\(7\) and \(8\)](#), if any individual other than the respondent claims title to a firearm seized under the ERPO Act, the firearm must be returned to the claimant if the court determines that the claimant is the lawful owner. [MCL 691.1815\(11\)](#).

Q: Is there a scenario where a court issues an ERPO, but allows the respondent 24 hours to surrender their firearms rather than immediate surrender?

A: Yes. Unless the petitioner is a law enforcement officer or health care provider, there is a presumption that the respondent will have 24 hours to surrender their firearms. [MCL 691.1807\(8\)](#).

Q: Why do the order forms require judges to make particularized findings related to each factor when neither the statute nor the court rule appear to contain such a requirement?

A: The SCAO forms used to issue an ERPO ([CC 453, Extreme Risk Protection Order, Adult Respondent](#); [CC 453M, Extreme Risk Protection Order, Minor Respondent](#)) **do not** require a court to make particularized findings related to each factor. However, the forms do contain check boxes and the ability to make particularized findings specific to each factor if the court so chooses. [MCL 691.1807\(7\)](#) requires the court to state in writing the "specific reasons" for issuing or refusing to issue the order.

Immediate Emergency Ex Parte Order

Q: For immediate emergency ex parte orders, how will law enforcement "file" the sworn written petition within one day if the court is closed?

A: [MCL 691.1807\(4\)](#) requires the law enforcement officer to file the sworn written petition within one *business day*, which excludes weekends and holidays. The filing is made with the court that issued the order.

Q: What happens if the officer's sworn written petition for an immediate emergency ex

parte order contains different (or fewer) material facts than presented verbally over the telephone to the judge the previous day?

A: The ERPO Act and court rules do not contemplate or address this specific situation. Any potential remedies or actions for filing a sworn petition that varies in material facts will be subject to judicial interpretation. The SCAO form [CC 455, Sworn Written Petition After Immediate Emergency Ex Parte Extreme Risk Protection Order](#) was organized in a manner to help promote a full and complete written report to the court. It may be helpful for law enforcement officers to consult this form while providing their verbal request to the court and for the judge to clearly indicate in the order the reasons stated over the phone considered to satisfy the burden.

Q: MCL 691.1807(7) states that, if the court refuses to grant an ex parte ERPO, the court must “immediately” state the reasons in writing. Does this mean that, if the court denies an immediate emergency ERPO over the phone at night, the judge needs to go into the office and write the reason?

A: Stating the reasons for denying an immediate emergency ERPO does not mean the judge must travel back to the court. The SCAO Form [CC 456, Order Denying Extreme Risk Protection Order](#) is a fillable PDF that can be handwritten or completed on a computer. The on-duty judge ruling on immediate emergency ERPOs may keep copies of this form, or use an alternative method, to quickly memorialize any specific reasons for denying an ERPO.

Q: Must the court immediately provide a copy of the immediate emergency ERPO to the requesting officer? Or does the requesting officer only receive a copy of the order after filing their sworn petition?

A: The clerk of the court is responsible for providing the petitioner with at least two true copies of the order, [MCL 691.1811\(1\)\(b\)](#), but the time-sensitive nature of immediate emergency ex parte orders might require the judge or court to immediately transmit an electronic copy of the order to the law enforcement officer in the field. An ERPO is effective and enforceable immediately after it is issued, but a law enforcement officer can only enforce the order if they (1) received a true copy of the order, (2) are shown a copy of it, or (3) have verified its existence on the law enforcement information network. [MCL 691.1809\(2\)](#). As such, courts are encouraged to take steps to ensure the officer has a copy of the order and can enforce it immediately.

Q: MCR 3.718(B)(3) requires the circuit court in each county to file for approval with the state court administrator a plan to make a judge or magistrate on duty and available each day of the year to immediately review and rule on a verbal request for an immediate emergency ERPO. Does the plan need to be a formal LAO? How is it submitted for approval?

A: The SCAO created [model LAO 53](#) to use when creating your plan of judicial availability

for immediate emergency ERPOs. Please email the LAO to your [regional administrator](#) for review and approval.

Search Warrant

Q: Where is the authority to require the prosecuting attorney to sign CC 458a?

A: SCAO form [CC 458a, Affidavit for Anticipatory Search Warrant Extreme Risk Protection Order](#), includes a space for the prosecuting attorney to review and sign when required by local practice. It is not a mandatory field and the form mirrors what is included on MC 231, Affidavit for Search Warrant and Search Warrant.

Q: What happens if a respondent challenges a search warrant?

A: The answer to this question ultimately depends on the circumstances of the search, the type of proceeding (i.e. civil or criminal), the type of relief or order sought by the respondent, the underlying authorities for each of those situations, and judicial interpretation.

Motions to Modify or Terminate

Q: Can motions to modify or terminate an ERPO be held before a referee, or must they be held before a judge?

A: Referees do not have authority to hear motions or recommend orders in ERPO actions.

Violations: Contempt of Court or New Criminal Offense

Q: ERPO actions are civil proceedings. As such, are violations of an ERPO considered a new criminal offense or contempt of court?

It depends on how the violation is charged by the prosecuting attorney. The ERPO Act established new *criminal* penalties for respondents who violate an ERPO; petitioners who knowingly and intentionally make a false statement to the court in a complaint; and individuals who knowingly place a firearm in the possession of an individual restrained under an ERPO. See [MCL 691.1819](#). Therefore, the prosecuting attorney has discretion on whether to charge a person with one of these crimes or file a motion to show cause why the respondent should not be held in contempt of court under [MCR 3.721\(B\)](#). The table below identifies the differences between contempt of court proceedings and new criminal offenses for ERPO violations.

	Contempt of Court	Criminal Offense (Felony)
Authority	MCL 691.1819(3) MCL 600.1701 et seq.	MCL 691.1819
Charging	By motion (prosecutor or law enforcement officer)	Criminal complaint (prosecutor)
Court	Family Division, Circuit Court	District Court/Bindover Circuit Court
First Appearance	Show Cause Hearing/Arrestment	Arrestment on Complaint
Arrestment Procedures	MCR 3.721(D)	MCR 6.104(D)
Burden of Proof	Criminal = Beyond Reasonable Doubt Civil = Clear and Convincing	Beyond Reasonable Doubt

Q: If a prosecuting attorney is considering filing a motion to show cause for contempt, is it civil or criminal contempt of court?

A: It depends on the violation and the reason for holding the respondent in contempt of court. Although ERPO actions are civil proceedings, contempt of court can be either civil or criminal. The distinction between civil and criminal contempt is critical, since criminal contempt proceedings require some, but not all, of the due process safeguards of an ordinary criminal trial. *In re Contempt of Dougherty*, 429 Mich 81, 91 (1987).

Please review the Michigan Judicial Institute’s [Contempt of Court Benchbook—Fifth Edition](#) for an extensive discussion and review of contempt of court procedures.

Q: What is the role of the prosecuting attorney in ERPO actions?

A: The prosecuting attorney is responsible for filing a motion, supported by appropriate affidavit, to have the respondent found in contempt of court and prosecuting contempt proceedings for ERPO violations. [MCR 3.721\(B\) and \(G\)](#). The prosecutor also may file an affidavit requesting a search warrant for certain violations. [MCR 3.721\(C\)](#). The prosecuting attorney carries the burden of proving the respondent’s guilt of criminal contempt beyond a reasonable doubt and the respondent’s guilt of civil contempt by clear and convincing evidence. [MCR 3.721\(H\)\(3\)](#). The prosecuting attorney also has the burden of proving the defendant’s guilt beyond a reasonable doubt if charged with a new criminal offense related to ERPOs.

Q: The respondent has the right to have an attorney for contempt of court proceedings. Are courts required to provide an attorney?

A: If the court determines it might sentence the respondent to jail, the court (or the local funding unit’s appointing authority as applicable) must appoint a lawyer at public expense if the respondent wants one and is financially unable to retain one. [MCR](#)

[3.721\(D\)\(1\)\(c\)](#).

Q: Does the respondent have a right to a jury trial for contempt proceedings?

A: There is no right to a jury trial for contempt of court proceedings for violating an ERPO. [MCR 3.721\(H\)\(1\)](#). This language is identical to MCR 3.708(H)(1), which also states there is no right to a jury trial for contempt of court proceedings for violating a personal protection order. But there is a right to a jury trial if the defendant is charged with a new criminal offense under [MCL 691.1819](#).

Q: What is the penalty for violating an ERPO?

A: It depends on whether the violation is prosecuted as contempt of court or a new criminal offense. The punishment for contempt may be a fine of not more than \$7,500.00, or imprisonment for no more than 93 days (for criminal contempt), or imprisonment until the person performs the act or duty or no longer has the power to perform the act or duty (for civil contempt). [MCL 600.1715](#). If prosecuted as a new criminal offense for refusal or failure to comply with the ERPO, the penalty for a first offense is a felony punishable by imprisonment for not more than one year or a fine of not more than \$1,000.00, or both. [MCL 691.1819](#).

ERPO Extensions

Q: MCL 691.1819(2) states that if a court “or a jury” finds the respondent refused or failed to comply with an ERPO, the court must issue an extended ERPO effective for one year after the expiration of the preceding order. However, MCR 3.721(H)(1) states there is no right to a jury trial for ERPO contempt proceedings—what am I missing?

A: Respondents do not have the right to a jury trial for contempt of court proceedings for violating an ERPO. However, the jury language contained in [MCL 691.1819\(2\)](#) is contained in the section that establishes new criminal penalties for violating an ERPO. A respondent who violates an ERPO is subject to contempt of court *or* being charged with a separate criminal offense. The “jury” language of MCL 691.1819 is likely referring to instances where a respondent is charged with a new criminal offense for violating an ERPO, does not waive a jury trial, and is ultimately convicted.

District Courts

Q: What involvement do district courts have in ERPO actions?

A: District court judges might have authority to issue an immediate emergency ERPO when verbally requested by a law enforcement officer over the telephone. Please review the January 31, 2024, memo [Extreme Risk Protection Order Act – District & Municipal](#)

[Courts](#) for additional information.

Q: How do district courts process ERPO actions?

A: District court judges who issue immediate emergency ERPOs *in their district capacity* also might be responsible for completing additional responsibilities under the ERPO Act, including verification compliance, law enforcement notifications, addressing violations, receiving proof of service, and processing requests for ERPO extensions. See the memo [Extreme Risk Protection Order Act – District & Municipal Courts](#) for additional information and discussion of this topic. Please also note that the JIS DCS system and the SCAO-approved forms are not developed to accommodate ERPO processing in district courts.

For these reasons, it may be prudent to only issue ERPO orders under the circuit court’s jurisdiction. This can be accomplished by amending your plan of concurrent jurisdiction under [MCL 600.401](#), allowing district judges to exercise the power and jurisdiction of the circuit court. Alternatively, courts could request their regional administrator to assign district court judges as circuit judges for the limited purpose of ruling on requests for and issuing immediate emergency ERPOs.

Q: [MCL 691.1807\(4\)](#) requires the court that issued the immediate emergency ERPO, if other than the circuit court, to provide a copy of the law enforcement officer’s sworn written petition to the circuit court. How should this petition be provided?

A: The ERPO Act and MCR 3.716-3.722 do not articulate a specific method of transmission. As such, please coordinate with your circuit court regarding the preferred method of transmission. This section is only applicable if the immediate emergency ERPO order is issued by a court *other than the circuit court*. If district or probate judges serve as circuit judges through a plan of concurrent jurisdiction or judicial assignment, there is no need to transmit the document since jurisdiction is already consolidated in the circuit court.

Records Access

Q: Are ERPO files public? Can ERPO case information be published online?

A: ERPO files are publicly available; however, they must not disclose the petitioner’s address and the SCAO does not recommend the case information be posted online. [MCL 691.1805\(7\)](#) and [MCR 3.716\(C\)](#) state the petitioner’s address **must not be disclosed** in any pleading, paper, or in any other manner. To protect this information, the SCAO created a separate, confidential form ([CC 450, Confidential Information](#)) to capture the petitioner’s address. This form must be maintained as nonpublic.

Additionally, [18 USC 2265\(d\)\(3\)](#) provides, in relevant part, that a state shall not 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, if such

publication would be likely to publicly reveal the identify or location of the party protected under the order.

Forms:

Q: What form does a petitioner use to request a hearing on an ERPO after the court denies the request for an ex parte order?

A: There is not a SCAO form for use in this specific situation.

Q: Are the forms only for use in circuit court?

A: Yes, the SCAO forms developed for ERPO actions are only for use in circuit courts. As previously noted, if district or probate court judges hear and rule on requests for immediate emergency ERPO orders, the SCAO recommends they do so under the circuit court's jurisdiction (i.e. concurrent jurisdiction or judicial assignment).

Q: What form does the court use to dismiss an immediate emergency ex parte ERPO because the law enforcement officer did not, without good cause, file a petition within one business day?

A: There is not a SCAO form for use in this specific situation. Courts may populate a generic order form to effectuate this dismissal.