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MEMORANDUM OF LAW

Re: Issues When a Firearms Transfer Is Delayed or Denied
Date: September 23, 2013

We get many inquiries from members of the public about firearm sales transactions that have been denied or delayed. This memo should help you determine why you have been denied or delayed the transfer of a firearm, obtain the information needed to confirm the validity of the denial or delay, and determine your options on how you may be able to resolve the issue causing the problem.

Questions from concerned firearms buyers have increased recently in conjunction with the California Department of Justice delaying more firearms transfers. We explain the reason for this increase in delays and what you can do to respond if your firearms transfer is delayed.

I. Overview of DOJ's Role in Background Checks

The Legislature has assigned the California DOJ's office the role of conducting a background check for almost every firearm purchase or transfer that occurs in California. Under current law, as part of this check, the DOJ must query its own criminal records databases, the federal NICS database, and state DMV and mental health databases to determine if a purchaser or transferee is prohibited from receiving a firearm.

A. Legally-Mandated Time Limits on Background Checks

California law mandates that the DOJ must complete its background check within ten days. Legislation pending as of the date of this memo would increase the background check period to potentially 30 days.

To start the background check process, the licensed dealer through whom the transfer or purchase is being transacted has the buyer and seller fill out a Dealer Record of Sale ("DROS"). The dealer, referred to as an FFL, then electronically submits the DROS to the DOJ. This starts the clock on the ten-day waiting period.

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At the end of the ten-day period, the DOJ must either allow or deny the transfer. If the DOJ issues either a “Proceed” response or no response, then the dealer is allowed by law to release the firearm to the purchaser. If the DOJ issues a “Deny” response, then the dealer must not transfer the firearm.

Current law only authorizes two instances when a transfer can be delayed. The first instance is where the DROS contains incomplete or incorrect information. Thus, missing or incorrect information supplied by the purchaser to the dealer can be subject to a delay. The purpose of the delay is to allow the DOJ to notify the dealer of the incorrect or incomplete information, and allow the dealer to supply the corrected information. Once the correct information is supplied to the DOJ by the dealer, the DOJ effectively has ten days from that point to issue a Proceed or Deny response.

The second instance where the DOJ can delay a transfer is when the DROS fee – the amount paid by the purchaser to the dealer for the background check – hasn’t been submitted to the DOJ. Again, the delay is for the purpose of allowing the DOJ to contact the dealer and get the fee. Once the fee is properly forwarded to the DOJ, the DOJ effectively has ten days from that point to issue a Proceed or Deny response.

These are the only two circumstances authorized by the Legislature for the DOJ to delay a transfer. Issues such as being overwhelmed by the number of background checks, errors in the DOJ’s own records, or a general lack of resources to process background checks are not proper or lawful reasons for delaying the transfer past the ten-day deadline.

B. The DOJ’s Resources to Fund Background Checks

Funding for the DOJ to conduct background check is generated by fees paid by firearms purchasers, often called the “DROS fee”. The DROS fees are deposited into a fund maintained for the DOJ called the DROS Special Account. While fees from other programs are deposited into this account, the overwhelming majority of fees generated for it are from DROS fees.

The DOJ uses the DROS Special Account to fund background checks and other programs related to firearms acquisition. Although it is unclear what authority it has to do this, the DOJ even uses the account to fund the salaries of its legal staff at its Bureau of Firearms. Despite potentially unauthorized expenditures from this account, and although the law states that the DROS fee can only be as high as necessary to fund background checks, the DROS fees nonetheless still generates a windfall for the DOJ well in excess of its costs of conducting background checks. In past years, the Legislature even allowed money to be temporarily loaned out of this account to make bridge loans to other state programs because the surplus in the account was so high.

Until May 2013, the DROS Special Account had a surplus of tens of millions of dollars. In May 2013, SB 140 was signed into law transferring \$24 million of the surplus from the DROS Special Account into a fund to augment the DOJ’s Automated Prohibited Persons System (“APPS”). Completely unrelated to background checks for acquiring firearms, APPS is used to identify persons who previously purchased a firearm who subsequently had some disqualifying event occur, like having a restraining order entered against them. The Legislative justification to transfer the \$24 million was to allow further investigation by task forces into people who might still own firearms but be prohibited from doing so.

Meanwhile, since the spike in firearms sales in late 2008, the DOJ’s ability to timely (within the ten-day period) process the background checks has been hampered. And as discussed below, in approximately March of 2012, the DOJ also adopted a policy, the effect of which has been to increase the workload for the DOJ’s staff and further impact its ability to complete background checks within the period mandated by the Penal Code.

Despite these developments, the DOJ has refused to use its budgetary surplus in the DROS Special Account to hire additional staff or spend money on resources to ensure its compliance with its ten-day mandate. Instead, it has asked the Legislature to grant it additional time to conduct the background checks – up to 30 days instead of 10. As of the date of this memo, that request is pending as AB 500. Additionally, as the DOJ's workload has increased, its responsiveness to inquiries from purchasers about why their transfer is being delayed has significantly decreased. The DOJ has been unable to consistently man the phones to answer purchasers' questions.

II. Firearm Transfer Denials

If you were *denied* a firearm transaction, more than likely it was for one of three reasons: a criminal conviction, mental health commitment, or a restraining order. A full list of prohibiting categories can be found [here](#).

A. Criminal Convictions from California Courts

If you have been recently arrested, have a pending arraignment court date, or are facing criminal charges, you can forgo the following information. Contact our office directly and immediately at (562) 216-4444 for a free consultation.

A criminal conviction is the most common reason a person is denied in a firearm sales transaction. Criminal convictions can have drastic and often unforeseen consequences firearm ownership and possession rights. The types of convictions, durations of firearm possession restrictions, and remedies available for these restrictions are outlined in [C.D. Michel's book, California Gun Laws](#). To understand the nature of your restriction and your options, [buy the book!](#)

1. Restoring firearms rights.

Firearm possession rights can be restored for certain criminal convictions. The availability of relief varies depending on the nature of the conviction. Usually an attorney will need to know five things to determine what type of relief may be available to you given your situation:

- 1) The specific code section(s) you were charged with;
- 2) The specific code sections(s) you were convicted of (these are not necessarily the same things, as a person can be charged with one thing and convicted of something else);
- 3) When the conviction[s] occurred;
- 4) The punishment you received (probation, county jail, state prison, etc.); and
- 5) Any other facts or events that may be relevant to the disposition of your case. (As a side note, any attorney who guarantees that they can restore your firearm rights without knowing or being provided this information, should not be trusted).

Typically when people contact Michel & Associates, they do not have this information handy. Unfortunately, we cannot review a case unless this information is available to us.

There are three ways to obtain this information:

- 1) From your former attorney (depending on how old the case is, an attorney may not have your file anymore);
- 2) From the court where your conviction took place (depending on the age of the case, the court may still have your case file, the file might be in the county hall of records, or in some cases the file may have been destroyed); or
- 3) By requesting a copy of your criminal background information from the California Department of Justice (“DOJ”) and/or the Federal Bureau of Investigation (“FBI”).

Request copies of your criminal history records by following the instructions at:

For California’s records: <http://oag.ca.gov/fingerprints>;

For the FBI’s records: <http://www.fbi.gov/about-us/cjis/criminal-history-summary-checks>.

Only you can request your personal criminal records from the California Department of Justice, or from the FBI.

For an additional fee we can assist you in obtaining your records from the court (if they are available), but it is typically not a process that requires a lawyer. It just takes time and perseverance. Once you obtain your records, we can assist in determining why you are prohibited and what (if any) options you have in restoring your firearm rights.

If you live in another state and are being denied a firearm based on a California case/conviction, in some states you can restore your firearm rights using a rights restoration mechanism in your state of residence. But in most cases a California case/conviction has to be dealt with in California courts, for the reason discussed below.

2. Ineffectiveness of 1203.4 expungements.

Some mistakenly believe that getting a prior conviction expunged under California’s expungement statute – Penal Code sections 1203 and 1203.4 – will restore their firearms rights. If you have a disqualifying conviction on your record, you may have been told by counsel who handled your criminal matter that you could later expunge the conviction. California law expressly provides that an expungement *does not* restore firearm rights.

California law does provide that certain disqualifying convictions only disqualify a person from owning or possessing a firearm for ten years after the conviction. Unfortunately, the lapse of the ten-year-period does not, in many instances, restore the person’s firearms rights. Federal law – under the Lautenberg Amendment to the Gun Control Act of 1968 – has been interpreted to make such a ban a lifetime ban.

The only way to have a disqualifying California conviction removed from your records, and thereby restore your firearms rights in California or any other state, is through a gubernatorial pardon. While Michel & Associates has successfully obtained pardons on behalf of clients, this sort of relief is extremely rare, is fact-specific to the type of conviction, and is subject to uncontrollable political considerations.

B. Mental Health-Based Restrictions

If you were denied a firearm or are prohibited from possessing firearms as a result of a mental health restriction, the nature of your commitment will determine what, if anything, can be done to restore firearm rights. More than likely you are prohibited as a result of a commitment pursuant to California Welfare and Institutions Code section 5150 or 5250. The most common difference between a “5150” and “5250” commitment is the amount of time a person stays involuntarily in a hospital. A 5150 commitment, by law, can only last 72 hours (though a person sometimes stays longer voluntarily). A 5250 commitment is an involuntary commitment, following a 5150 commitment. A 5250 commitment can last up to 14 days.

To attempt to restore your firearm rights, you will need to obtain copies of your hospital files. In some cases, a person will be taken to one hospital, and then transferred to another that focuses on mental health issues. Files from both hospitals are needed in order to determine what, if anything, can be done to restore your firearm possession rights.

You can ask the hospitals at which you were examined for your records from the hospital(s) where you were held. Hospital/medical files tend to be thick, so if you only received a couple pieces of paper from the hospital, they probably didn’t give you your entire file. For an additional fee, we can assist you in obtaining your records from the hospital(s). But again, it doesn’t typically require a lawyer. Just time.

Once you have your hospital files we can evaluate these records and tell you whether you can restore your firearm possession rights.

C. Restraining Orders and Injunctions Issued by California Courts

The third-most common way a person becomes prohibited from possessing firearms is as a result of a restraining order or injunction being issued.

There are a number of types and durations of restraining orders or injunctions.

1. Temporary restraining orders.

If you have been served with a temporary restraining order (“TRO”), you must you turn your firearms in to law enforcement OR sell them to a licensed firearm dealer. You will also have a pending court date for a permanent restraining order hearing. If you have been served with a temporary restraining order, contact our office immediately. We strongly advise against going to court by yourself without an attorney.

2. Permanent restraining orders.

A permanent restraining order can last, in most cases, up to three years with the possibility of an extension for another three years. Once a restraining order is put in place after a hearing, it is very difficult to remove or modify. You will usually need to show that the original order was improper (a very difficult thing to prove), or that there has been a change in circumstances that should allow for the removal of the restraining order.

D. Convictions or Court Orders From Non-California Courts

If your conviction occurred in a state other than California, or you currently reside in another state, and your denial stems from a case/conviction occurring outside of California, we *strongly* suggest contacting an attorney from that state. More than likely, you will need to resolve your matter in that state.

If you are being denied a firearm in California based on an out-of-state case/conviction, you received some form of post-conviction relief in that state, and you believe that your denial in California is incorrect, contact our office to discuss our retainer for reviewing these types of denials. Before we are able to conduct a review, we will need all of your past case information. For an additional fee, we will be happy to assist you in tracking down this information.

III. Firearm Purchase Delays (“DROS Delays”)

Firearm transaction “delays” have exponentially increased over the past year. For the most part, these delays stem from the DOJ’s inability to determine the outcome of an arrest or a criminal case. For the DOJ’s explanation of their “delay” policy, visit their website at: <http://oag.ca.gov/firearms>.

The DOJ is of the opinion that if your criminal record does not affirmatively reflect a favorable outcome to criminal charges that were potentially firearm prohibiting, the DOJ cannot give a firearm dealer a “proceed” response to release the firearm to you. Instead, the DOJ insists that they must receive proof that you did not suffer a prohibiting conviction. The DOJ claims that because of downsizing of court staff, furloughs, etc., it has been taking them longer than normal to obtain this information. In many cases, the DOJ has told the delayed person that it is up to the purchaser to obtain their own proof that they are eligible (essentially doing the DOJ’s work for them).

A. Incomplete DOJ Records

The impetus for the DOJ’s policy, and its impacts on firearms purchasers and FFLs, seems to be a study showing that the DOJ’s criminal arrest records database is inaccurate with regard to arrests. Whether the database needs to be fixed is debatable. What shouldn’t be subject to debate is the problem with the DOJ relying upon lawful firearms to do the legwork rather than fixing the flaws with the criminal record system.

1. Arrest records.

Any time an arrest occurs, it must be reported to the DOJ by the arresting law enforcement agency. The arrest information for each individual is then included in an electronic file maintained by the DOJ. The system is accessible by California law enforcement agencies, so that, for example, when a person is stopped by police, the police can run a quick criminal history check through a mobile data terminal to see what prior crimes the person had been arrested for or convicted of, whether there are any restraining orders out on the person, whether the person is on probation, etc.

Although a person is arrested, they may not be charged with a crime. Law enforcement agencies have discretion to arrest a person for a crime, but release them from custody without charging them with a crime, e.g., holding a drunk in the drunk tank overnight to sober up, and then releasing him.

When an arrestee is not charged with a crime and is simply cut loose, there is no reporting requirement under the law for that circumstance. Further, while there is a great deal of documentation generated for an arrest

and accompanying charges (e.g., a booking record, perhaps a police report, and the aforementioned electronic report to the DOJ), there is very little paperwork generated for a release without charges.

Thus, the arrest that had been previously reported to the DOJ by the arresting agency would very likely not have a corresponding “disposition” reflected in the DOJ’s database. Moreover, there would be little paperwork to prove the outcome of the arrest, as any incidental paperwork that might have been generated would likely have been destroyed. This type of “missing” disposition is one of types of dispositions that the DOJ is insisting by their new policy that you provide as a condition of receiving your lawfully-purchased firearm.

2. Cases rejected by the prosecutor

In some instances, an arrest will result in a recommendation by the law enforcement agency to the local district attorney to pursue charges against the arrestee. But the local prosecutor is not bound to follow the law enforcement agency’s recommendations. Thus, the prosecutor can reject the case for filing. This is sometimes referred to as a “D.A. Reject.”

In instances where the local prosecutor declines to prosecute and rejects the case, the arrestee is released. Like with an arrest and release above, when a prosecutor rejects a case, there is no legal obligation to report such a D.A. Reject to the DOJ.

3. Charges with dismissals by the court.

When criminal charges are filed against a defendant by the local prosecutor, a “complaint” is generated by the local prosecutor and filed with the court, a court case number is assigned, and that complaint, including the criminal violations for which the defendant has been charged, is reported to the DOJ. Because of this, another report is made to the DOJ and put in its criminal records databases; this time the information is a court case corresponding to the previously-reported arrest.

Under many circumstances, a defendant will be charged with a crime, a complaint will be generated, but the charges will later be dropped. Such circumstances include the local prosecutor deciding in the interests of justice not to pursue the matter, or a determination that there is insufficient evidence to prosecute the defendant.

In the circumstance where an arrest results in charges and a complaint being filed with the court, but the charges are not pursued or are dismissed, the law puts the burden on the local superior court to report the dismissal. In most instances, this occurs.

In circumstances where such a report is actually made by the court, then the DOJ’s records should reflect an arrest, a subsequent criminal charge, and a subsequent dismissal, i.e., a disposition of the arrest and charge. This is another of the types of missing dispositions in DOJ’s database that the DOJ is insisting that you provide definitive proof regarding as a condition of receiving your lawfully-purchased firearms.

4. Diversion programs.

Once a formal criminal case has been filed, the passage of time in that case can actually result in a disposition not being reported by the court to the DOJ. Although the Penal Code puts the burden of reporting subsequent disposition information on the superior courts, changes in the law allowing for diversion programs – such as “in-lieu-of” punishments and drug counseling programs – have further created situations where

disposition information is not being subsequently reported to the DOJ.

When a defendant pleads or is found guilty of a charged crime, but the court delays imposition of sentence subject to the defendant demonstrating good behavior for a period of time, or fulfilling other in-lieu-of conditions like a drug diversion program, such a defendant is not considered under California law to have been convicted of the charged crime. By fulfilling the terms imposed by the court, the defendant has not been convicted of the disqualifying offense and is not barred from acquiring firearms.

But because in-lieu-of terms and diversion programs may not need to be completed for 6, 12, or 18 months after the court imposes them, when they are finally completed, it is often a non-event for the courts. Because of the passage of time, they have no mechanism in place to mark when the in-lieu of terms were completed and to fulfill their statutory obligation to report that a diversion program was completed and no conviction resulted.

Thus, because of this circumstance, the DOJ's records may show a disqualifying arrest and charge, but no disposition information.

These sort of in-lieu-of terms are common in drug cases. Beginning in 1972, drug diversion programs for minor drug offenses were allowed under the Penal Code in lieu of conviction and punishment. In many of the delay instances now occurring, these sorts of pioneering decades-old drug diversion cases are the arrests being flagged by the DOJ as requiring additional proof in order to release your firearm.

Most disturbing about the DOJ's desire to clean up these particular set of incomplete records is that a 30-to-40-year-old drug conviction is not a disqualifying ground for purchasing or owning a firearm in California. Rather, the Penal Code requires evidence of *ongoing use* of narcotic drugs in order to justify the suspension of firearm rights. Oftentimes, a recent conviction for possession or use suffices. But a decades-old conviction – often when the purchaser was a teenager or in college – with no subsequent criminal history of drug use, does not meet the statutory definition of disqualifying drug use. Thus, the DOJ is patently unreasonable when it claims that it needs disposition information about a 30-year-old drug arrest to ensure that disqualified people don't buy firearms. It knows that without a subsequent criminal history of drug use, that old drug arrest, had it resulted in a conviction, would *never* disqualify a person from owning a firearm.

The DOJ is thus using a facially false interpretation of what disqualifies a person from owning firearms to justify imposing its new policy for old drug offenses. Whether it is doing do to curtail firearms ownership, or to simply conscript law-abiding citizens into performing its own clerical duties, is unclear.

v. Incomplete disposition records.

Reports of dispositions – that an arrest ultimately resulted in no disqualifying conviction – are serially not being made to the DOJ. The condition is so prevalent that the California History Repository determined that for a ten-year period ending in 2009, over 45 percent of the arrest records generated in California during that time had no corresponding disposition information. Thus, of 15 million arrest records generated, almost seven million had no disposition information.

Because the DOJ has now decided that this non-reporting needs to be corrected, the DOJ and the California Administrative Office of the Court started the California Disposition Reporting Improvement Project (“CA-DRIP”) to attempt to fix the system. Currently CA-DRIP is in the pilot program stage in Santa Clara County and will not be implemented on a statewide basis for many years. Until then, the DOJ is attempting to

address what it considers to be a broken system by implementing programs like their new policy denying eligible firearms purchasers the right to possess their lawfully purchased firearms

But California's allegedly broken criminal records system has not created a situation where disqualified convicts are slipping through the cracks when it comes to firearms purchases. When a defendant is convicted of a crime in a California court, this information is reported by the respective superior courts to the DOJ, and results in a definitive record of conviction in the DOJ's criminal records database. The lack of incentives and enforcement that cause courts to under-report *non-convictions* to the DOJ simply do not exist with convictions. Convicts appear in front of the court, and therefore have a reportable case number and a court file is generated, and the reporting of the conviction is assured through court-adopted procedures.

The accurate reporting of a conviction to the DOJ is also of import to courts and law enforcement agencies. There are numerous and important public policy factors driving courts to ensure a conviction is promptly reported to state criminal records databases. Such factors include enforcing driver's license restrictions occasioned by a conviction, giving notice to law enforcement agencies of no-contact orders and other conviction conditions, implementing and enforcing probation or parole conditions, and ensuring professional licensure disqualifications are properly reported and acted upon by the appropriate state agencies.

The claim that incomplete disposition records raise the danger of convicts purchasing firearms is nothing more than a false cry.

B. Addressing the DOJ's Incomplete Records

There is a potential mechanism to make the DOJ clean up their own incomplete record of you, thereby potentially resolving the basis for the DOJ delaying your current and future purchases. When you request a copy of your criminal information from the DOJ, you will automatically receive a form allowing you to challenge the accuracy or completeness of your record entitled "Claim of Alleged Inaccuracy or Incompleteness" (Form BCIA 8706). If you are delayed, request a copy of your criminal history from DOJ. Once you receive it, attempt to track down your criminal case file from the jurisdiction where the case took place, using the steps described above. Then, fill out the "Claim of Alleged Inaccuracy or Incompleteness" form, explaining: (1) that your record is incomplete; (2) what happened in your case (charges were never filed, the case was dismissed or rejected by the district attorney, etc.); and (3) that the incompleteness is restricting your ability to acquire a firearm, and consequently, restricting your Second Amendment rights.

If you are able to obtain information on your past case (if any exists) supporting your explanation of events, you are required to include it. If none exists, you should state this as well and what you steps you took to attempt to find it.

There is current litigation challenging the DOJ's position concerning delays in firearm transactions. It is unknown when that litigation will be resolved. We will be publishing additional information as to other steps you may take to correct this problem as we develop them.

IV. Conclusion

If you have any questions, or would like to discuss implementing one of the above-mentioned procedures, please call our office at (562) 216-4444. Please have the information discussed above handy and be ready to forward it to our office once you have had a chance to discuss your case with one of our employees. Please do not send originals to our office, and do not send documents to our office without speaking to us first.

California and federal laws are constantly changing. For updates on changes in state and federal firearm laws, sign up for alerts from our website [here](#).

For Further Assistance:

For links to free information on firearms laws, the Legal Resources section of our www.calgunlaws.com website has subsections on various firearms law topics. Check it out!

To stay updated on firearm law issues please subscribe to our firearms law newsletters, Facebook pages, and Twitter feed. CalGunLaws.com, CalGunLaws.com's e-Bulletins, the [Self-Defense Defense](#), [Right to Keep and Bear Arms](#), [MichellLawyers](#), and [Shooting Range Lawyers](#) informational Facebook pages, and the [@MichellLawyers](#) Twitter feed are produced as a *pro bono* public service by [Michel & Associates, P.C.](#).

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