

## Memorandum 93-27

Subject: Study J-800 - Orders to Show Cause and Temporary Restraining Orders Under the Code of Civil Procedure

Exhibit 1 is a letter from Judge Joseph Harvey of the Lassen County Superior Court on the confusing time requirements for serving orders to show cause and temporary restraining orders, and on the lack of uniformity in the time within which a hearing must be held. He makes a strong case that the statutes are confusing, inconsistent, and should be improved. (The Commission's Family Code cleanup bill deals with similar problems with domestic violence protection orders.)

Attached is a staff draft of a Tentative Recommendation on *Orders to Show Cause and Temporary Restraining Orders* to address the problems identified by Judge Harvey. He also wrote to the Judicial Council, asking it to sponsor legislation on this topic. Attorney Diane Nunn on the Judicial Council staff said the Judicial Council has not acted on his request, and would be happy to see the Commission take the lead on this project.

The Commission's authority to study this topic is included in its authority to study whether "the law on injunctions and related matters should be revised." The attached draft amends two sections in the injunctions chapter in the Code of Civil Procedure, but it is evident that the whole chapter (Sections 525-534) needs revision. It is an untidy mix of 1872 Field Code provisions, special interest legislation, and procedural provisions. But with the other priority studies in active progress, the staff believes it cannot now undertake to revise the injunctions chapter. The attached draft addresses the problems identified by Judge Harvey without attempting to revise the whole chapter.

The staff recommends we circulate this Tentative Recommendation for comment with a view toward having legislation ready for 1994.

Respectfully submitted,

Robert J. Murphy  
Staff Counsel

## SUPERIOR COURT OF LASSEN COUNTY

COURTHOUSE, SOUTH LASSEN STREET

SUSANVILLE, CALIFORNIA 96130

August 28, 1992

(916) 257-8311  
EXT. 120JOSEPH B. HARVEY  
JUDGELaw Revision Commission  
RECEIVEDFile: \_\_\_\_\_  
Key: \_\_\_\_\_San Francisco Daily Journal  
1390 Market Street, Suite 1210  
San Francisco, CA 94102

Re: Service of and hearing on ex parte OSC/TROs

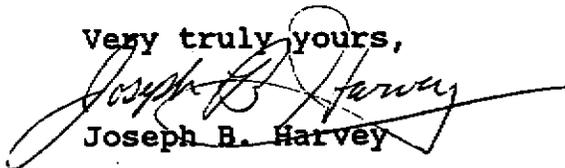
Dear Daily Journal:

Enclosed is a paper I wrote concerning a recurring problem I have had with the service of ex parte temporary restraining orders and orders to show cause. As you can tell from the text, there seems to be some confusion about the matter.

In fact, if I read correctly the notes in my copy of Bancroft-Whitney's Judicial Council Forms Manual, some courts are routinely issuing void restraining orders and orders to show cause by requiring service at least 15 days before the hearing and allowing some additional time to get the documents to the official doing the serving.

I have previously written to the Judicial Council about the problem, but I am not aware that any action has been taken. Hence, I am forwarding this paper to you in the hope that you might find it worthy of publication and that publication might spur someone to take some remedial action.

Very truly yours,

  
Joseph B. Harveycc: Los Angeles Daily Journal  
Judicial Council  
Calif. Law Revision Commission  
Calif. State Sheriffs' Association

HOW TO OBTAIN A VOID RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION

Joseph B. Harvey<sup>1</sup>

On August 11, 1992, I signed a temporary restraining order (TRO) in a domestic violence action (CCP section 546<sup>2</sup>). As required by the governing statute, I also signed an order to show cause (OSC) and set the hearing on the OSC on August 31, 1992. About 10 days later, the plaintiff was back at the court with a letter from the sheriff of a different county refusing to serve the OSC/TRO (hereafter, OSC/TRO is used to refer to an order to show cause issued together with an ex parte temporary restraining order) because there was insufficient time before the hearing to serve the papers, and there was no order shortening time.

The letter from the Sheriff was a form letter, and it recited: "Must be served 15 days prior to court date." Typed onto the form letter was the recitation: "Please make sure we have at least 1 weeks [sic] time for service of this paper prior to the 15 days before hearing."

This was not the first time that a sheriff has refused to serve an OSC/TRO issued by this court because it could not be served at least 15 days before the court date. In each case, I have written to the sheriff involved and have informed him not only

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<sup>1</sup>The author is the Judge of the Superior Court of Lassen County. He was formerly the Assistant Executive Secretary of the California Law Revision Commission and played a major role in the drafting of the California Evidence Code, the California Tort Liability Act, as well as other Law Revision Commission legislation.

<sup>2</sup>All statute citations hereafter are to the Code of Civil Procedure unless otherwise specifically indicated.

that he is wrong about the service time requirements, but also that he should not be making objections on behalf of defendants and respondents for lack of timely service. I have had to write to one sheriff three times concerning the same problem.

Sheriffs are not the only ones that do not understand the rules relating to the service of OSC/TROs. Attorneys, too, sometimes ask for the issuance of an OSC/TRO with a hearing date set beyond the time permitted by statute, and I have to tell them that the court does not have the authority to do so.

Apparently, part of the problem is that the California State Sheriffs' Association Civil Procedural Manual states, without any qualification, that an ordinary OSC must be served at least 15 days before the court hearing, a domestic violence OSC/TRO must be served at least 15 days before the hearing, and an harassment OSC/TRO must be served at least 10 days before the hearing.

Contributing to the problem is that fact that some of the Judicial Council forms for OSC/TROs provide for an order shortening time for hearing when, as will appear hereafter, in most cases where an OSC/TRO is issued, there is no need for an order shortening time because there is no minimum time limit for service. Similarly, the Uniform Parentage Act, in Civil Code section 7020, in authorizing a court to grant an ex parte TRO in the manner prescribed by Code of Civil Procedure section 527, authorizes the court to "shorten the time for service" when, as will appear hereafter, there is no minimum time for service of an OSC/TRO contained in section 527.

The underlying problem is that the Sheriffs' Association Manual, some sheriffs, and some lawyers (including those who

drafted Civil Code section 7020) do not distinguish between an ordinary OSC and an OSC that has been issued with a TRO. An ordinary OSC, without a TRO, is simply a motion, and is therefore governed by the service requirements for motions generally. (CCP sec. 1003, 1005; Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 213.) Hence, an ordinary OSC, without a TRO, must be served at least 15 days before the date of the court hearing.<sup>3</sup> (CCP 1005(b).) The policy that apparently underlies the 15 day minimum notice is that the responding party ought to have at least that much time to prepare an opposition to the motion, and since no TRO has been issued, the responding party suffers no adverse consequence if the hearing is held 15, 20, 25, or even more days after service of the notice of hearing.

Other considerations come into play, however, when an ex parte TRO is granted. Because the responding party, without any prior notice, has been prohibited from doing some things or has been compelled to do some things -- vacate his home, stay away from his children, surrender custody, etc. -- the law requires the matter to be brought to court on the earliest day that the business of the court will permit, and in any event not later than a stated maximum period that varies, depending on the type of proceeding in which the TRO was issued.

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<sup>3</sup>Because an OSC is simply a motion, I have refused to sign an OSC where no TRO is requested since I first became a judge 13 years ago. Because an OSC without a TRO is simply a motion, the moving party can accomplish the same thing -- notice the adverse party to appear in court to respond to an application for an order -- by a notice of motion. I believe it is a waste of judicial time to read an application for and to sign a simple OSC (without a TRO) when the moving party can bring the matter to court just as efficiently with a notice of motion.

In civil cases generally, if a TRO is issued without notice, Code of Civil Procedure section 527 requires that an OSC be issued and a hearing set on the OSC no later than 15 days after the OSC is granted. In family law matters, if an ex parte TRO is issued, section 527 requires the court to issue an OSC setting the matter for hearing no later than 20 days after the TRO is granted. (See also Civ. Code sec. 7020 for the same rule in Uniform Parentage Act proceedings.) In domestic violence proceedings, if an ex parte TRO is issued, the court is required to issue an OSC setting the matter for hearing no later than 20 days after the OSC/TRO is granted. (CCP sec. 546.) In each case, for good cause shown, the court is authorized to add five days to the maximum time within which the hearing must be held.

Inexplicably, where an ex parte TRO is issued to prohibit harassment, an OSC must be issued setting the matter for hearing within 15 days after the filing of the petition. (CCP sec. 527.6.) The word "inexplicably" is used, because until the TRO is granted, the defendant suffers no adverse consequence, *i.e.*, he is not required to do anything and he is not prohibited from doing anything -- so there is no apparent reason why the maximum time for hearing on the harassment OSC/TRO should run from the time the petition is filed.

But it should be noted that each of these statutes establishes a maximum time within which the hearing on the OSC/TRO must be held, which time starts to run at the time the OSC/TRO is granted (or, in the case of an harassment OSC/TRO, when the petition is filed), not when the order is served.

Witkin points out that the hearing on the OSC/TRO may be set

earlier than the maximum time specified in the governing statute. (Witkin, California Procedure (3d ed.), Provisional Remedies, sec. 289.) In fact, none of the governing statutes -- Code of Civil Procedure sections 527, 527.6, and 546, and Civil Code section 7020 -- contains a minimum time limit for service of an OSC/TRO. And McDonald v. Superior Court (1937) 18 CA2d 652 held that an OSC/TRO made returnable on the same day that it was issued and served complied with the requirements of section 527.

Although there is no statutory requirement that an OSC/TRO be served any minimum time before the hearing on the OSC/TRO, section 527 does require the moving party to serve upon the respondent the moving papers and the affidavits to be relied on by the moving party at least two days before the hearing. In McDonald, supra, the moving party had caused the moving papers and affidavits to be served on the respondent (together with a void OSC/TRO) several days before the valid OSC/TRO was issued and served, thus complying with the two day minimum service requirement. Hence, the OSC/TRO could be made returnable on the same day it was signed and served.

Rule 363(c) of the California Rules of Court requires that an OSC/TRO in civil harassment proceedings (CCP sec. 527.6) be served at least 10 days before the hearing. Because the hearing must be set within 15 days from the date the petition was filed, and there is no provision in the statute for extending that 15 days, there is a very narrow window within which to accomplish service. If there is any delay between the time the petition is filed and the OSC/TRO is signed, or if there is any delay in getting the OSC/TRO to the sheriff for service (and there is invariably delay if the OSC/TRO must be sent out of county for service), it is virtually

impossible to effect service within the time limit prescribed by the rule. And if the sheriff returns the document without service, it immediately becomes totally impossible to have a hearing on the OSC within 15 days after the filing of the petition. Fortunately, the governing statutes and rules contain no other minimum service requirements.

The above comments are not simply nit picking. If an OSC/TRO is made returnable beyond the maximum time limit fixed by statute, the OSC/TRO is void, and the court lacks jurisdiction to hear it. (McDonald v. Superior Court (1937) 18 CA2d 652; Agricultural Prorate Comm. v Superior Court (1938) 30 CA2d 154; see also, Witkin, California Procedure (3d ed.), Provisional Remedies, sec. 298.)

In McDonald, supra, the moving party obtained an OSC/TRO returnable one day after the maximum time for hearing permitted by statute. The Court of Appeal held that the OSC/TRO was void and the trial court did not have jurisdiction to hear it. On the merits, the case seems right on the question whether the TRO was void; but the holding that the OSC was also void and the court had no jurisdiction to hear it appears wrong in principle. Since an OSC is simply a motion (CCP sec. 1003; Difani v. Riverside County Oil Co. (1927) 201 Cal. 210,213), if the OSC/TRO is served more than 15 days before the hearing as required by section 1005 (thereby rendering the TRO void), it is difficult to see why the OSC should also be void simply because it is accompanied by a void TRO. "Superfluity does not vitiate." (Civ. Code sec. 3537.) But, nevertheless, the McDonald case held that where a TRO is set for hearing on an OSC beyond the statutory time limit, both the TRO

and the OSC are void and the court lacks jurisdiction to proceed.

Particularly where domestic violence and harassment OSC/TROs are concerned, the courts are often involved with threats of violence, actual violence, and actual or potential serious bodily harm. Frequently, the moving party's only real protection against further violence is the TRO and, after hearing, the subsequent injunction prohibiting the defendant/respondent from coming near. Because the TRO and ensuing injunction often require the violent defendant/respondent to move out of the parties' home, and to remain 50, 100, 300, etc. yards away from the moving party, the protected party can call for police intervention when the defendant/respondent simply approaches and before he [it's usually a "he"] gets close enough to inflict actual bodily harm.

Violation of a void order is not a contempt. (Oksner v. Superior Court (1964) 229 CA2d 672.) So, obviously, a void TRO provides a threatened complainant with no protection at all until the hearing on the OSC. And if the court lacks jurisdiction to hear the OSC (as held in McDonald), the injunction issued at the OSC hearing may also be void<sup>4</sup> and provide the besieged complainant with no protection against the later threatened violence. Thus, the pervasive misunderstanding concerning the hearing and service requirements for an OSC/TRO has a great potential for very serious consequences for complainants who think they have been protected by a TRO or injunction.

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<sup>4</sup>West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 CA3d 693 holds that a party may be precluded from challenging the jurisdiction of the trial court in acting on an OSC/TRO where that party participated in the hearing without objection. That holding, of course, does not assist the complainant if the responding party objects or does not appear at all.

To eliminate much of the misunderstanding and confusion concerning the maximum hearing date for an OSC/TRO, the various statutes should be amended to require that the hearing be set within a uniform 21 days (an even three weeks) from the date the OSC/TRO is granted unless good cause for a longer time is shown by affidavit or is stated in the court's order, in which case the maximum should be 28 days (an even four weeks). The provision in the harassment statute (sec. 527.6) that the hearing must be held within 15 days from the time the petition is filed should be repealed. It would greatly simplify practice and procedure for sheriffs, attorneys, and courts if there were just one set of uniform time limits for all OSC/TROs.

The unrealistic 10 day minimum service time in Rule 363(c) of the California Rules of Court should also be repealed. It is unneeded because section 527 now provides that, although the moving party must be ready to proceed on the day set for the hearing and must have served all moving papers at least two days in advance, the responding party is entitled to a reasonable continuance as a matter of course. There is no need for a special service requirement applicable only to an harassment OSC/TRO.

It would also be helpful if the statutes themselves specifically stated that the time required by section 1005(b) for service of a notice of motion does not apply to an OSC/TRO issued under section 527 (civil and family law), 527.6 (harassment), or 546 (domestic violence) or under Civil Code section 7020 (Uniform Parentage Act).

Finally, the confusion engendered by the present statutory scheme would be substantially dispelled if just one statute --

section 527 -- prescribed the procedure for obtaining an OSC/TRO, and the other statutes simply cross-referred to that procedure. That is what Civil Code section 4359 does now so far as family law OSC/TROs are concerned, and there is no reason why the domestic violence, harassment, and Uniform Parentage Act statutes relating to OSC/TROs should not do the same.

In the meantime, attorneys and courts should be aware that existing case law is to the effect that an OSC/TRO returnable after the last date permitted by statute is void, the court does not have jurisdiction to proceed on the OSC, and, hence, both the TRO and any injunction issued at a hearing set beyond the time limit specified by statute are void and unenforceable. (Oksner v. Superior Court (1964) 229 CA2d 672.)

In the meantime, too, sheriffs should simply serve as promptly as possible all OSC/TROs that are given to them for service, and they should not be raising objections to the timeliness of service on behalf of the parties to be served. Doing so, especially when they are wrong, not only delays the court proceedings unnecessarily, but frequently deprives a complainant threatened with violence and serious bodily harm with the needed protection provided by the TRO.

STATE OF CALIFORNIA

California Law Revision Commission

Staff Draft

TENTATIVE RECOMMENDATION

ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

May 1993

*This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.*

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN July 10, 1993.

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

## SUMMARY OF RECOMMENDATION

This tentative recommendation would clarify and standardize the rules in the Code of Civil Procedure on time requirements for serving and hearing orders to show cause and temporary restraining orders.

ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

Times Within Which Hearing Must be Held and Notice Must Be Served

If a party obtains a temporary restraining order without formal notice<sup>1</sup> to the other party, the party may have a problem serving the order to show cause the required number of days before the hearing.<sup>2</sup>

In most proceedings, the hearing must be held not later than 15 days after the date the order was issued.<sup>3</sup> The court may extend this time to 20 days.<sup>4</sup> In a civil harassment proceeding, the hearing must be held not later than 15 days after the date the petition was filed.<sup>5</sup>

The order to show cause must be served on the restrained party

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1. Code of Civil Procedure Section 527 requires a prompt hearing if a temporary restraining order is issued "without notice." This means without formal notice. See 2 California Civil Procedure Before Trial § 39.38 (Cal. Cont. Ed. Bar (1992)). Section 527 requires a good faith attempt to inform the other party (e.g., by telephone) that a temporary restraining order will be applied for, but this informal notice does not affect the requirement of a prompt hearing.

2. This problem was brought to the Commission's attention by Joseph B. Harvey, Judge of the Superior Court of Lassen County. See letter from Judge Joseph B. Harvey to San Francisco Daily Journal (August 28, 1992) (copy on file in office of California Law Revision Commission).

3. Code Civ. Proc. § 527(a). Section 527 does not apply to family law proceedings. The Family Code has its own provisions governing service of and hearings on orders to show cause and temporary restraining orders. See Fam. Code §§ 240-245 [as revised by AB 1500].

4. Code Civ. Proc. § 527(a).

5. Code Civ. Proc. § 527.6(d). There is no authority in Section 527.6 for the court to extend the time for hearing.

before the hearing, but the time required for notice is unclear.<sup>6</sup> If the general 15-day notice of hearing requirement applies, the order to show cause would have to be served the day it is issued in order to satisfy the requirement that the hearing be held within 15 days after issuance of the temporary restraining order. In practically every case the applicant would have to persuade the court either to delay the hearing for an additional five days or to grant an order shortening time for service. Good cause must be shown for either order.<sup>7</sup>

The time prescribed for service and hearing should not require an application to the court and a showing of good cause in every case to delay the hearing or shorten the time for service. The statute should provide a reasonable time for service, and require an application to the court only in an unusual case. This may be done by lengthening the time within which the hearing must be held, by allowing service to be made nearer in time to the hearing, or both.

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6. Compare Code Civ. Proc. § 527 with Code Civ. Proc. § 1005(b). Section 1005, the general statute for giving written notice, provides that "[u]nless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 15 days before . . . the hearing." Section 527 requires affidavits and points and authorities to be served at least two days before the hearing, but does not specify a time for serving the order to show cause.

A leading treatise states that the order to show cause and temporary restraining order should be served at least two days before the hearing, citing Section 527. 2 California Civil Procedure Before Trial Injunctions §§ 39.39, 39.43 (3d ed., Cal. Cont. Ed. Bar 1992). Accord, Marshal's Manual of Procedure § 112 (rev. 1/85). But sheriffs normally require an order to show cause with a temporary restraining order to be served at least 15 days before the hearing. See California State Sheriffs' Association, Civil Procedural Manual 2.21 (4th ed. 1989, rev. 1992).

If a temporary restraining order is issued under the Family Code, the order to show cause must be served at least two days before the hearing. Fam. Code § 243 [as amended by AB 1500].

7. Code Civ. Proc. § 527 (good cause to delay hearing); Cal. R. Ct. 305 (good cause to shorten time for service). Presumably, the obvious difficulty both of having the hearing within 15 days of the order and serving the order at least 15 days before the hearing will in every case constitute good cause for the court to extend the time for the hearing or to shorten the time for service.

The Commission recommends that the time within which the hearing must be held should be extended to 20 days, or, if good cause is shown, to 25 days after the date of the order. This affects both the general provision for temporary restraining orders<sup>8</sup> and the civil harassment provision.<sup>9</sup> The civil harassment provision measuring the time for hearing from the filing of the petition should be revised to measure the time from the date of the temporary restraining order.<sup>10</sup>

The Commission recommends a flexible scheme for service. Service should be made at least five days before the hearing if the hearing is set ten or more days after the date of the order, or at least two days before the hearing if it is set less than ten days after the date of the order.<sup>11</sup> This will give the applicant a reasonable time for

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8. Code Civ. Proc. § 527.

9. Code Civ. Proc. § 527.6. Requiring the hearing to be held within 20 days of the date of the order will make the Code of Civil Procedure consistent with the Family Code, and make the time periods the same regardless of the nature of the proceeding. See Fam. Code § 242 [as revised by AB 1500].

10. Both the time limit for service and the time limit for the hearing are for the benefit of the party against whom the temporary restraining order is issued. The applicant who obtained the order has no need for an early hearing as long as the order remains in effect. Requiring service a reasonable time before the hearing gives the party restrained time to prepare for the hearing. Requiring a prompt hearing gives the party restrained an early opportunity to contest the order. *International Molders & Allied Workers Union, Local 164 v. Superior Court*, 70 Cal. App. 3d 395, 407, 138 Cal. Rptr. 794 (1977). Until a temporary restraining order is served, the party is not required to do or refrain from doing anything, and thus suffers no adverse consequence. There appears to be no justification for the civil harassment provision (Code Civ. Proc. § 527.6) measuring the time for hearing from the date the petition is filed.

This suggests the time within which a hearing must be held should be measured from the date of service of the temporary restraining order, not from its issuance. But the time for hearing is set when the order is issued, at which time it is impossible to know when service will be made. Measuring the time for hearing from issuance rather than service of the order is a practical solution to this problem.

11. The party restrained is protected by a right to one continuance to prepare for the hearing. Code Civ. Proc. § 527. If the party exercises the right to a continuance, the party is estopped to assert the temporary restraining order expired during the period of the continuance. *International Molders & Allied Workers Union, Local 164 v. Superior Court*, 70 Cal. App. 3d 395, 407, 138 Cal. Rptr. 794 (1977).

service, while the party restrained will have sufficient time to prepare for the hearing.<sup>12</sup>

Hearing on Order to Show Cause Despite Void Temporary Restraining Order

If a temporary restraining order is served but not brought to hearing within the statutory time, it is void.<sup>13</sup> If the temporary restraining order is accompanied by an order to show cause and not brought to hearing within the statutory time, both are void.<sup>14</sup> There is no sound reason to make the order to show cause void merely because it is accompanied by a void temporary restraining order. Instead it should be treated as a notice of motion.<sup>15</sup>

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12. The recommended legislation conforms Family Code Section 243 by extending the requirement that service be made at least two days before the hearing to five days before the hearing if it is set ten or more days after the temporary restraining order.

13. *Agricultural Prorate Commission v. Superior Court*, 30 Cal. App. 2d 154, 85 P.2d 898 (1938).

14. *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 64 P.2d 738 (1937). According to Joseph B. Harvey, Judge of the Superior Court of Lassen County, some courts routinely issue void temporary restraining orders and orders to show cause by requiring service at least 15 days before the hearing and setting the hearing later than the required 15-day period to allow time for service. See *supra* note 2.

15. By case law, if an order to show cause is issued without a temporary restraining order, the order to show cause is simply a notice of motion. See *Difani v. Riverside County Oil Co.*, 201 Cal. 210, 213-14, 256 P. 210 (1927); *Eddy v. Temkin*, 167 Cal. App. 3d 1115, 1120, 213 Cal. Rptr. 597 (1985); see also Code Civ. Proc. § 1003 (application for order is a motion); California State Sheriffs' Association, Civil Procedural Manual 2.14 (4th ed. 1989); Marshal's Manual of Procedure § 112 (rev. 1/85). A notice of motion must be served at least 15 days before the hearing, with additional time allowed for service by mail. See Code Civ. Proc. § 1005(b) (time for serving motions); see also California State Sheriffs' Association, Civil Procedural Manual 2.15 (4th ed. 1989) (rev. 1991). The recommended legislation codifies this rule to make clear that an order to show cause without a temporary restraining order is treated as a notice of motion, and is subject to the same time requirements for service as a notice of motion.

The Commission recommends that, if a hearing is not held on the order to show cause within the prescribed time, the court should still be able to hear the matter, but a temporary restraining order issued without notice would be unenforceable unless reissued.<sup>16</sup>

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16. The Family Code permits the court, on the filing of an affidavit by the applicant that the respondent could not be served within the time required, to reissue a temporary restraining order previously issued and dissolved by the court for nonservice. Fam. Code § 245. The Family Code provision was formerly in Code of Civil Procedure Section 527(b), but its application was limited to domestic violence prevention orders. The recommended legislation would duplicate this provision in the Code of Civil Procedure and generalize it to apply to all temporary restraining orders other than those issued under the Family Code.

## RECOMMENDED LEGISLATION

Code Civ. Proc. § 527 (amended). Injunctions and temporary restraining orders

527. (a) An injunction may be granted at any time before judgment upon a verified complaint ~~;~~ or upon affidavits ~~;~~ if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits upon which the injunction was granted, must, if not previously served, be served therewith.

(b) A temporary restraining order or a preliminary injunction, or both, may be granted in a class action, in which one or more of the parties sues or defends for the benefit of numerous parties upon the same grounds as in other actions, whether or not the class has been certified.

(c) No preliminary injunction shall be granted without notice to the ~~opposite party;~~ ~~nor shall any~~ opposing party.

(d) No temporary restraining order shall be granted without notice to the opposite opposing party, unless (1) it shall appear both of the following requirements are satisfied:

(1) It appears from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice ~~and (2) the~~ .

(2) The applicant or the applicant's attorney certifies one of the following to the court under oath (A) that :

(A) That within a reasonable time prior to the application ~~he or she~~ the applicant informed the opposing party or ~~his or her~~ the opposing party's attorney at what time and where the application would be made ~~;~~ ~~(B) that he or she~~ .

(B) That the applicant in good faith attempted but was unable to inform the opposing party and his or her the opposing party's attorney but was unable to so inform the opposing party or his or her attorney, specifying the efforts made to contact them; ~~or~~ .

(C) ~~that~~ That for reasons specified ~~he or she~~ the applicant should not be required to so inform the opposing party or ~~his or her~~ the opposing party's attorney.

(e) In case a temporary restraining order ~~shall be~~ is granted

without notice, in the contingency above specified in subdivision (d), the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 20 days or, if good cause appears to the court, 20 25 days, from the date of the temporary restraining order is issued. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed ~~and must have served~~. If a hearing is not held within the time required by this subdivision, the court may nonetheless hear the matter, but the temporary restraining order is unenforceable unless reissued under subdivision (i).

(f) The party who obtained the temporary restraining order shall serve upon the opposite opposing party at least two days prior to the hearing, within the time provided in subdivision (g) a copy of each of the following:

(1) If not previously served, the complaint and of all affidavits .

(2) The order to show cause.

(3) Affidavits to be used in the application and a copy of the points .

(4) Points and authorities in support of the application, if .

(g) Service shall be made at least five days before the hearing if the hearing is set ten or more days after the temporary restraining order is issued, or at least two days before the hearing if the hearing is set less than ten days after the temporary restraining order is issued. The court may for good cause, on motion of the applicant or on its own motion, shorten the time for service on the opposing party.

(h) If the party who obtained the temporary restraining order is not ready, or if he or she the party fails to serve a copy of his or her complaint, affidavits and points and authorities, as herein required, comply with subdivision (f), the court shall dissolve the temporary restraining order. The defendant, opposing party, however, shall be entitled, as of course, to one continuance for a reasonable period, if he or she the opposing party desires it, to enable him or her the opposing party to meet the application for the preliminary injunction. The defendant opposing party may, in response to such the order to show cause, present affidavits relating to the granting of the

preliminary injunction, and if such the affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day on which the order is made returnable, the hearing shall take precedence of all other matters on the calendar of the day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

(i) Upon the filing of an affidavit by the applicant that the opposing party could not be served within the time required by subdivision (g), the court may reissue any temporary restraining order previously granted and dissolved by the court for failure to serve the opposing party. The reissued order shall state on its face the date of expiration of the order. No fee shall be charged for reissuing the order unless the order has been reissued two times previously.

(j) If no temporary restraining order has been issued pending the hearing, the applicant shall serve a copy of the papers described in subdivision (f) within the time provided by Section 1005.

~~(b)~~ (k) This section does not apply to an order described in Section 240-ef issued under the Family Code.

Comment. Subdivision (e) of Section 527 is amended to change the time within which a hearing must be held on an order to show cause and temporary restraining order granted without notice from 15 to 20 days and, where good cause is shown, from 20 to 25 days. A temporary restraining order under the Family Code is subject to the same limitations. See Fam. Code § 242(a).

Subdivision (e) is also amended to make clear that if a hearing is not held within the time required, the court may hear the order to show cause as though it were a notice of motion, and may hear the application for a permanent order. This changes the result in *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 64 P.2d 738 (1937). Although subdivision (g) permits the order to show cause to be served less than 15 days before the hearing (the general requirement for a notice of motion under Section 1005), the short time permitted for service is ameliorated by subdivision (h) which gives the opposing party the right to a continuance to prepare for the hearing. If the opposing party exercises that right, the temporary restraining order is deemed extended until the hearing. *International Molders & Allied Workers Union, Local 164 v. Superior Court*, 70 Cal. App. 3d 395, 407, 138 Cal. Rptr. 794 (1977). If there is no continuance, a temporary restraining order issued without notice that is not heard within the time

prescribed by subdivision (e) and not reissued is unenforceable. This is consistent with *Agricultural Prorate Commission v. Superior Court*, 30 Cal. App. 2d 154, 85 P.2d 898 (1938).

Subdivision (f) is amended to include a copy of the order to show cause with the documents that must be served at least two days before the hearing. A copy of the complaint must be served only if not previously served, consistent with the second sentence of subdivision (a).

Subdivision (g) is added to provide that service shall be made at least five days before the hearing if it is set ten or more days after the temporary restraining order is issued, or at least two days before the hearing if it is set less than ten days after the temporary restraining order is issued, and to give the court authority to shorten the time for service. The new authority for the court to shorten time for service is consistent with Family Code Section 243. The requirement of good cause for shortening time is taken from Rule 305 of the California Rules of Court.

Subdivision (i) gives the court authority to reissue a temporary restraining order not served within the required time. This is consistent with *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 655-56, 64 P.2d 738 (1937), and with Family Code Section 245.

Subdivision (j) is added to make clear that, if a temporary restraining order has not been issued, the order to show cause must be served within the time provided by Section 1005 for a notice of motion (15 days, with additional time if mailed). This treats an order to show cause without a temporary restraining order the same as a notice of motion for a preliminary injunction without a temporary restraining order. See 2 *California Civil Procedure Before Trial Injunctions* § 39.43 (3d ed., Cal. Cont. Ed. Bar 1992).

The other revisions to Section 527 are technical.

**Code Civ. Proc. § 527.6 (amended). Temporary restraining order and injunction prohibiting harassment**

527.6. (a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section.

(b) For the purposes of this section, "harassment" is a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff. "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included with the meaning of "course of conduct."

(c) Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order ~~in accordance with subdivision (a) of Section 527.~~ A temporary restraining order under this section is governed by Section 527 except to the extent this section provides a rule that is inconsistent. A temporary restraining order may be ~~granted~~ issued with or without notice upon an affidavit which, to the satisfaction of the court, shows reasonable proof of harassment of the plaintiff by the defendant, and that great or irreparable harm would result to the plaintiff. A temporary restraining order granted under this section shall remain in effect, at the court's discretion, for a period not to exceed ~~15~~ 20 days, or for good cause 25 days, unless otherwise modified, reissued, or terminated by the court.

(d) ~~Within 15 days of the filing of the petition~~ 20 days, or, if good cause appears to the court, 25 days, from the date the temporary restraining order is issued, a hearing shall be held on the petition for the injunction. The defendant may file a response which explains, excuses, justifies, or denies the alleged harassment or may file a cross-complaint under this section. At the hearing, the judge shall receive such testimony as is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment. An injunction issued pursuant to this section shall have a duration of not more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under this section.

(e) Nothing in this section shall preclude either party from representation by private counsel or from appearing on ~~his or her~~ the party's own behalf.

(f) In a proceeding under this section where there are allegations or threats of domestic violence, a support person may accompany ~~a party~~ the plaintiff in court and, where the ~~party~~ plaintiff is not represented by an attorney, may sit with the ~~party~~ plaintiff at the table that is generally reserved for the ~~party and his or her~~ plaintiff and the plaintiff's attorney. The support person is present

to provide moral and emotional support for ~~a person who alleges he or she is a victim of domestic violence~~ the plaintiff. The support person is not present as a legal adviser and shall not give legal advice. The support person shall assist the ~~person who alleges he or she is a victim of domestic violence~~ plaintiff in feeling more confident that he or she the plaintiff will not be injured or threatened by the other party during the proceedings where the ~~person who alleges he or she is a victim of domestic violence~~ plaintiff and the other party must be present in close proximity. Nothing in this subdivision precludes the court from exercising its discretion to remove the support person from the courtroom if the court believes the support person is prompting, swaying, or influencing the ~~party assisted by the support person~~ plaintiff.

(g) Upon filing of a petition for an injunction under this section, the defendant shall be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition. Service shall be made at least five days before the hearing if the hearing is set ten or more days after the temporary restraining order is issued, or at least two days before the hearing if the hearing is set less than ten days after the temporary restraining order is issued. The court may for good cause, on motion of the applicant or on its own motion, shorten the time for service on the opposing party.

(h) The court shall order the plaintiff or the attorney for the plaintiff to deliver a copy of each temporary restraining order or injunction, or modification or termination thereof, granted under this section, by the close of the business day on which the order was granted, to the law enforcement agencies within the court's discretion as are requested by the plaintiff. Each appropriate law enforcement agency shall make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported harassment.

(i) The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any.

(j) Any willful disobedience of any temporary restraining order or injunction granted under this section is punishable pursuant to Section

273.6 of the Penal Code.

(k) This section does not apply to any action or proceeding covered by Title 1.6C (commencing with Section 1788) of the Civil Code or by Part 4 (commencing with Section 240) of Division 2 of the Family Code. Nothing in this section shall preclude a plaintiff's right to utilize other existing civil remedies.

(l) The Judicial Council shall promulgate forms and instructions therefor, rules for service of process, scheduling of hearings, and any other matters required by this section. The petition and response forms shall be simple and concise.

Comment. Subdivision (c) of Section 527.6 is amended to extend the time a temporary restraining order remains in effect from 15 to 20 days, or for good cause 25 days, unless otherwise modified, reissued under Section 527, or terminated by the court. Although subdivision (c) permits a temporary restraining order to be issued without notice, the plaintiff must make a good faith effort to give informal notice or show good cause for not doing so. See Section 527(d); Cal. R. Ct. 379.

Subdivision (d) is amended to extend the time within which a hearing must be held to 20 days, or, if good cause appears to the court, 25 days, from the date of the temporary restraining order. This conforms Section 527.6 to Section 527 of the Code of Civil Procedure, and to Section 242 of the Family Code. Formerly, under Section 527.6 the required time was 15 days from the date of the filing of the petition, unless otherwise modified or terminated by the court.

The other revisions to Section 527.6 are technical.

#### CONFORMING REVISION

Fam. Code § 243 (amended). Readiness for hearing; continuance; counter-affidavits

243. (a) When the matter first comes up for hearing, the applicant must be ready to proceed.

(b) If a temporary restraining order has been issued without notice pending the hearing, the applicant must have served on the respondent, ~~at least two days before the hearing,~~ within the time provided in subdivision (d) a copy of each of the following:

(1) The order to show cause.

(2) The application and the affidavits and points and authorities in support of the application.

(3) Any other supporting papers filed with the court.

(c) If the applicant fails to comply with subdivisions (a) and (b), the court shall dissolve the order.

(d) Service shall be made at least five days before the hearing if the hearing is set ten or more days after the temporary restraining order is issued, or at least two days before the hearing if the hearing is set less than ten days after the temporary restraining order is issued.

(e) If service is made under subdivision (b), the respondent is entitled, as of course, to one continuance for a reasonable period, to respond to the application for the order.

~~(e)~~ (f) On motion of the applicant or on its own motion, the court may shorten the time provided in this section for service on the respondent.

~~(f)~~ (g) The respondent may, in response to the order to show cause, present affidavits relating to the granting of the order, and if the affidavits are served on the applicant at least two days before the hearing, the applicant is not entitled to a continuance on account of the affidavits.

Comment. Section 243 is amended to provide that service of the order to show cause and supporting papers shall be made at least five days before the hearing if the hearing is set ten or more days after the temporary restraining order is issued, or at least two days before the hearing if the hearing is set less than ten days after the temporary restraining order is issued. Under subdivision (f), the court may shorten these times. Formerly, the two-day service requirement applied without regard to when the hearing was set. See also Code Civ. Proc. § 527.

Note. Section 243 is shown as it would be revised by the Commission's 1993 Family Code cleanup bill, AB 1500.