

Memorandum 93-36

Subject: Study J-801— Orders to Show Cause and Temporary Restraining Orders (Comments on Tentative Recommendation)

Attached is a staff draft of a Recommendation on *Orders to Show Cause and Temporary Restraining Orders*. In preparing this draft, the staff revised the Tentative Recommendation sent out for comment based on comments we received. The changes to the TR are described in staff notes in the attached draft.

We received four letters commenting on the TR. They are from the State Bar Committee on Administration of Justice (Exhibit, pp. 2-5), Executive Committee of the State Bar Family Law Section (Exhibit, p. 6), Judge Joseph Harvey (Exhibit, pp. 7-9), and attorney Dianna Gould-Saltman (Exhibit, p. 10). The Executive Committee of the Family Law Section unanimously supports the TR, but the CAJ opposes some of its main features. The comments are discussed below.

Time Within Which Hearing Must Be Held

The TR proposed to extend from 15 to 20 days the time within which a hearing must be held on an OSC and TRO under the Code of Civil Procedure. The TR also proposed to extend from 20 to 25 days the upper limit on court discretion to extend the time. These longer time limits were drawn from the Family Code.

The CAJ opposes extending the time limits because failure to give a prompt hearing to a restrained party may prejudice important rights. The CAJ sees no reason why time requirements in the CCP have to be the same as in the Family Code — the Family Code “addresses concerns quite different from those of civil litigants generally.” Exhibit, p. 3. In view of the concern of the CAJ, the staff recommends we not try to make the time requirements in the CCP the same as those in the Family Code.

Judge Harvey suggested the hearing be held within 21 days after the OSC/TRO, which the court could extend to 28 days. Exhibit, p. 7. Expressing time requirements in multiples of seven days would make California law like Michigan’s. Judge Harvey says this would better fit the weekly court calendar. Especially in small counties, there may only be one law and motion day a week. Under existing time limits of 15 days which may be extended to 20 days, the

court cannot extend the hearing for one week until the next law and motion day. In these cases, the five-day permissible extension is useless.

The staff thinks Judge Harvey's suggestion has merit. Perhaps we can reconcile the CAJ's concern that the time limits not be significantly extended with Judge Harvey's concern by adding two days to the present five-day period the court may extend the time. This would preserve the present basic 15-day time requirement under the CCP, but the court could extend this to 22 days for good cause. This is the approach taken in the attached draft. (The attached draft makes no revisions to the Family Code.)

Time Within Which Service Must Be Made

The TR proposed a flexible scheme for service of the OSC: Service would have been required at least five days before the hearing if set ten or more days after the order, or at least two days before the hearing if set less than ten days after the order. (This idea came from staff rather than from Judge Harvey.) The CAJ does not favor this scheme, and thinks the restrained party's right to a continuance is enough protection against having insufficient time to prepare for the hearing.

Because of CAJ's concern, the staff revised the attached draft to keep existing law that service must be made at least two days before the hearing, with a right to a continuance for the restrained party. But a strong argument can be made that, where the hearing is set ten or more days after the order, the restrained party should be served more than two days before the hearing. This would give additional protection to the restrained party by allowing more time to prepare, and possibly obviating the need to request a continuance. Should the flexible scheme for service be restored in the attached draft, despite CAJ's opposition?

The CAJ would add language to say the continuance shall be not less than 15 days unless a shorter period is requested by the party seeking it. The staff has no objection to this suggestion. Its substance is included in the attached draft.

Papers to be Served; Hearing on OSC if TRO Not Timely Brought to Hearing

Under existing law, the moving party must serve the complaint, affidavits, and points and authorities. There is no requirement that the TRO be served — service of the TRO is optional with the moving party.

If the TRO is served but not brought to hearing within the required time, both the TRO and OSC are void. *Agricultural Prorate Commission v. Superior Court*,

30 Cal. App. 2d 154, 85 P.2d 898 (1938); *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 64 P.2d 738 (1937). Both the TR and the attached draft would overturn this rule by permitting an OSC to be heard as a notice of motion where the TRO is not brought to hearing within the required time, but the TRO would be unenforceable. This was suggested by Judge Harvey and seems sound.

The CAJ wants to require that the TRO be served. The CAJ "strongly opposes" permitting the OSC to be heard as a notice of motion, but gives no reason for its opposition. If the CAJ proposal to forbid hearing the OSC as a notice of motion is adopted, its proposal to require that the TRO be served seems less objectionable. But without some policy reason for preventing the court from hearing the OSC as a notice of motion where the TRO is unenforceable, the staff cannot recommend this proposal.

The CAJ would require the OSC to show the time, date, and place of the hearing. This is consistent with the rule for a notice of motion, which must state when the motion will be heard. Code Civ. Proc. § 1010. It is also consistent with Judicial Council forms. See, e.g., Judicial Council Form CH-120. The staff has no objection to this suggestion and it is included in the attached draft.

Civil Proceedings Criminal in Nature

Ms. Gould-Saltman is concerned about the Comment to Section 527, explaining the amendment permitting the court to hear the OSC despite failure to hold a hearing on the TRO within the prescribed time. Exhibit, p. 10. The Comment says this permits the court to "hear the order to show cause as though it were a notice of motion." Ms. Gould-Saltman is concerned this language in the Comment might undermine the respondent's right in proceedings that are criminal in nature, such as civil contempt, to avoid self-incrimination and to require proof beyond a reasonable doubt. This concern seems unjustified for the following reasons:

- (1) Section 527 will not apply to proceedings under the Family Code.
- (2) An OSC for contempt under the CCP is governed by Sections 1209-1222, not by Section 527 which applies to orders to show cause for injunctive relief.
- (3) The privilege against self-incrimination applies in civil proceedings generally and is not dependent on whether the hearing is on an OSC or a motion. 2 B. Witkin, *California Evidence Witnesses* §1373, at 1337-38 (3d ed. 1986). Ms. Gould-Saltman says that, to avoid self-incrimination, the respondent may want to present testimonial evidence and not file declarations. But if the respondent

can avoid self-incrimination by using oral testimony, it is not clear why the same thing cannot be achieved with declarations.

(4) Ms. Gould-Saltman seems to assume the respondent has a right to present testimonial evidence in an OSC hearing, but not in a hearing on a motion. But court discretion to exclude testimonial evidence applies equally whether the hearing is on an OSC or a motion. See *Reifler v. Superior Court*, 39 Cal. App. 3d 479, 114 Cal. Rptr. 356 (1974); Code Civ. Proc. §§ 1003, 2009; Cal. R. Ct., Rule 323.

(5) If the proceeding is criminal in nature, guilt must be proved beyond a reasonable doubt. *Ross v. Superior Court*, 19 Cal. 3d 899, 913, 569 P.2d 727, 141 Cal. Rptr. 133 (1977); 8 B. Witkin, *California Procedure Enforcement of Judgment* § 341, at 294 (3d ed. 1985); 1 B. Witkin, *California Evidence Burden of Proof and Presumptions* § 162, at 139 (3d ed. 1986). The standard of proof does not turn on whether the hearing is on an OSC or a motion, and so is unaffected by the proposed revisions to Code of Civil Procedure Section 527.

Narrative Explanation of Recommendation

Judge Harvey thought the narrative portion of the TR gave too much credence to the argument that general notice requirements for motions in Section 1005 of the CCP might govern an OSC with a TRO. The *McDonald* case, *supra*, held an OSC could be served the same day as the hearing, so the argument that the 15-day service requirement of Section 1005 might apply appears without merit. Accordingly, in the attached draft, the staff rewrote the narrative to stress the need for uniformity of time requirements, rather than the need to negate application of Section 1005.

Respectfully submitted,

Robert J. Murphy
Staff Counsel



THE STATE BAR OF CALIFORNIA

OFFICE OF RESEARCH

555 FRANKLIN STREET, SAN FRANCISCO, CALIFORNIA 94102-4498

Law Revision Commission

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September 2, 1993

RECEIVED

Robert Murphy
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43
File: _____
Key: _____

Re: Comments on Tentative Recommendation on Orders to Show Cause
and Temporary Restraining Orders

Dear Mr. Murphy:

Enclosed are the comments of the State Bar's Committee on Administration of Justice and the Executive Committee of the Family Law Section concerning the Law Revision Commission's tentative recommendation on orders to show cause and temporary restraining orders circulated for comment in May 1993.

These comments are only those of the Committee on Administration of Justice and the Family Law Section and have not been adopted or endorsed by the State Bar's Board of Governors and should not be considered the position of the State Bar of California.

We appreciate the opportunity to comment on this tentative recommendation. Please contact me if you questions or need further information concerning these comments.

Sincerely,

David C. Long
Director of Research

DCL:ec
Enclosures

cc: Margaret Morrow
William Dato
Donn Pickett
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THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

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TO: David C. Long,
Director of Research

FROM: Committee on Administration of Justice
Virginia H. Gaburo

DATE: August 30, 1993

SUBJECT: California Law Revision Commission Tentative
Recommendation on Orders to Show Cause and Temporary
Restraining Orders

=====

COMMITTEE POSITION: Oppose unless amended.

ANALYSIS:

(1) Brief Description of Proposal

The California Law Revision Commission proposes to amend CCP sections 527 and 527.6, and Family Code section 243. Numerous of the proposed changes are non-substantive in nature, i.e., changing "his or her" to "the opposing party's." Other changes would create flexible criteria to determine, and would generally increase, the time after issuance of a TRO within which an OSC must be held. The prefatory material provided asserts that the time required for service of notice of an OSC after a TRO is unclear, and cites in support of this assertion an apparent misstatement of the law in the California State Sheriffs' Association, Civil Procedural Manual 2.21 (4th ed. 1989, rev. 1992). Judge Harvey's letter, dated June 2, 1993, suggests that OSC hearing dates be set in multiples of seven days after issuance of a TRO to more conveniently coincide with the court's calendar in jurisdictions where such matters may be heard on only one day of the week.

(2) Reasons for Recommended Position

The non-substantive proposed changes, while not particularly objectionable, do not add clarity, would appear to be unnecessary, and, in some instances, create ambiguity.

The Committee is not in favor of the proposed flexible criteria to determine the time within which an OSC must be held, and does

not believe that the time should be increased beyond the present 15 (or 20) days as now provided. The law should be simple and swift. A defendant may be burdened with an onerous TRO obtained without his or her knowledge, and should be allowed a hearing as early as possible. Under existing law, if the defendant, whose interests are the proper ones to seek to protect, desires more time, he or she is entitled to one continuance as of right upon request. CCP section 527(a). The Committee believes that this request should entitle the defendant to a continuance of at least 15 days. The Committee would propose to address any claimed ambiguity in the law in relation to the two-day notice period for an OSC following issuance of a TRO by specifically enumerating in CCP section 527 the order to show cause as one of the papers to be served.

The Committee strongly opposes the Law Revision Commission's recommendation which authorizes the court to hear the order to show cause as if it were a notice of motion where a hearing on the accompanying temporary restraining order is not held within the required time.

Finally, the Committee does not feel it is important that the Code of Civil Procedure sections dealing with preliminary injunctions, TROs and OSCs utilize the same time periods or procedures as are now or may in the future be provided in the Family Code, which addresses concerns quite different from those of civil litigants generally, and the Committee believes that the present 15 to 20 days, with two days' notice, is sufficiently flexible to accommodate those courts issuing TROs and/or hearing OSCs on only one day of the week.

(3) Proposed Amendments

The following proposed amendments are to the subject statutes as they are now scheduled to become operative on January 1, 1994, and are not amendments to the Law Revision Commission's recommendations herein. New material is underlined.

CCP section 527

(a) . . .

(midway down the third paragraph)

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 upon the opposite party at least two days prior to the hearing, a copy of the complaint and of all affidavits to be used in the application, a copy of the order to show cause containing the time, date and place of the hearing and a copy of the points and authorities in support of the application; if the party is not ready, or if he or she fails to serve a copy of his or her complaint, affidavits, order to show cause and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period if he or she desires it of not less than 15 days, unless a shorter period is requested by the defendant, to enable him or her to meet the application for the preliminary injunction. . . .

(b) The court may, upon the filing of an affidavit by the plaintiff that the defendant could not be served on time, reissue any temporary restraining order previously issued pursuant to this section and dissolved by the court for failure to serve the defendant. Any order reissued under this subdivision shall state on its face the date of expiration of the order. No fees shall be charged for the issuance of any order under this subdivision, unless such order has been dissolved three times previously.

(b) (c) This section does not apply to an order described in Section 240 of the Family Code.

CCP section 527.6

. . . .

(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 except to the extent this section provides a rule which is inconsistent therewith. A temporary restraining order may be granted 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 days, unless otherwise modified or

David Long, Director of Research
LRC's Tentative Recommendations on Orders
To Show Cause and Temporary Restraining Orders
August 30, 1993
Page 4

terminated by the court.

. . .

(f) 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 two days before the hearing.

cc: Margaret M. Morrow
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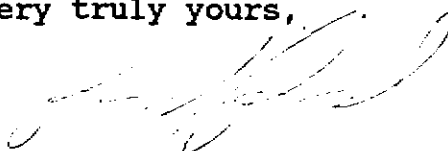
RE: **FAMILY LAW EXECUTIVE COMMITTEE/SECRETARY REFERRAL**

Dear Mr. Long:

This will confirm my telephone conversation of August 16, 1993 wherein I advised your office that on August 14, 1993, the Executive Committee of the Family Law Section unanimously supported the California Law Revision Commission's tentative recommendation on Orders to Show Cause and Temporary Restraining Orders.

If you have any questions, please feel free to call.

Very truly yours,



RONALD ROSENFELD

RR:ld
cc: Mr. Donald Breer
Stephen Wagner, Esq.

2:7570008-FLEXCOM\LONG.LTR

SUPERIOR COURT of LASSEN COUNTY

COURTHOUSE, SOUTH LASSEN STREET
SUSANVILLE, CALIFORNIA 96130

JOSEPH B. HARVEY
JUDGE

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June 2, 1993

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Key: _____

Re: Orders to Show Cause and Temporary Restraining Orders

Dear Bob:

I have reviewed your recommendation and proposed legislation concerning the service of Orders to Show Cause and Temporary Restraining Orders.

On the merits of the proposal, please consider the possibility of changing the maximum time within which a hearing must be held on an OSC/TRO to 21 days, with the possibility of an extension for good cause to 28 days.

Like most small courts, and many medium sized courts, this court has one law and motion day per week. The rest of the week is used for trials and other court business. My law and motion days are Mondays. Butte and Sierra Counties' are on Fridays. But most northern California courts -- Modoc, Plumas, Shasta, Tehama, etc. -- have their law and motion days on Mondays. All OSC/TROs are made returnable on law and motion day. (Rarely is evidence presented. Usually they are decided on affidavits. But if a more extended hearing is required where substantial live evidence is going to be presented, I continue the hearing to the first day available for an extended hearing.)

So, when an application for an OSC/TRO comes in, in order to allow adequate time for service, I usually fix the return day on the last Monday before the 20 day maximum time limit expires. For example, if the application were presented on Monday, April 5, I would make it returnable on Monday, April 26. Although that is 21 days after the order is signed, I believe that I can set the hearing on the 21st day because the 20th day falls on a weekend. (See CCP § 12a.) If there were good cause for providing more time, I could not do so under current law because 25 days from the date of the order would expire on April 30, the Friday before the next law and motion day.

It is not uncommon for the last Monday before the expiration of the maximum 20 day time limit to fall on a holiday. In those cases, I would like to be able to set the hearing for the following Monday -- 7 days later. But the current law, providing for a

maximum extension of only 5 days, does not permit that to be done.

I recently had some proceedings in this court relating to the enforcement of a Michigan judgment. One of the issues I had to decide was whether the Michigan court had given the defendant due process by complying with its own rules in granting a summary judgment (it had). But in connection with the proceedings, the parties provided me with the Michigan court rules on motion procedure. I was struck by the fact that Michigan uses 7, 14, 21, and 28 day increments for their various notices in motion matters. Those increments correspond to the weekly cycles in which court calendars are set, and that sort of increments would make it much easier for this court to set hearings on OSC/TROs.

A basic maximum of 21 days, with the possibility of an extension of the maximum to 28 days for good cause shown, would eliminate a lot of inconvenience in setting these matters for hearing, and would eliminate a lot of difficulty in continuing a setting to the next law and motion day.

In the discussion of current law, the preliminary discussion of the recommendation appears to me to overlook the requirement of the statutes that the hearing on the OSC/TRO must be set "on the earliest day that the business of the court will admit of, but not later than 15 days . . ." after the OSC/TRO is issued. It is because of that requirement that the 15 day minimum notice requirement of CCP § 1005, applicable to motions generally, does not apply to OSC/TROs. That is why McDonald v. Superior Court (1937) 18 CA2d 652 was able to hold that an OSC/TRO returnable on the same day that it was issued was proper. (See the discussion at 18 CA2d at 656.) McDonald specifically holds that same day issuance and hearing is authorized by this language of the governing statute -- at least where the complaint and affidavits to be relied on were previously served (thus meeting the two day requirement). McDonald also holds that the defendant is not harmed by this procedure because of his absolute right to a continuance to give him time to prepare opposition.

I am aware, of course, that many attorneys and judges -- and unfortunately many sheriffs -- believe the 15 day requirement of CCP § 1005 is applicable, despite the inconsistent language of CCP § 527. But there is no statutory or case authority for that belief, and McDonald, the only case of which I am aware to actually consider the question, specifically held in effect that "earliest day" means "earliest day", not "earliest day after 15 days notice has been given".

I am drafting a suggested possible revision of the staff draft to incorporate some of these thoughts. It is not quite finished; but I will forward it to you -- probably within the week -- as soon as I have completed it. But I thought I had better get this letter to you so that you can consider it -- even if I don't finish the proposed revision.

Thank you for permitting me to comment on your proposal. The legislation is long overdue.

Very truly yours,

Joseph B. Harvey

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9 June 1993

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Key: _____

Nathaniel Sterling
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Re: Orders to Show Cause and Temporary Restraining Orders,
Tentative Recommendations

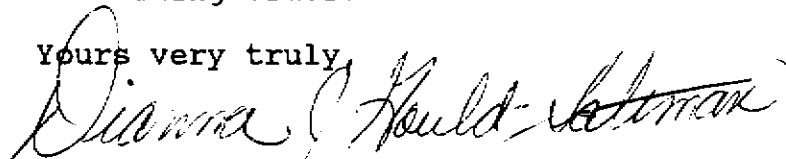
Dear Mr. Sterling:

Upon review of the tentative recommendation, I am pleased that there is an effort being made to standardize the time requirements. My only concern is the inclusion of the statement, at item (3) that "the court may hear the order to show cause as though it were a notice of motion."

Generally, if there has been proper notice, an Order to Show Cause for restraining orders could reasonably fall within the parameters of In re Marriage of Reifler where, in the court's discretion, the matter may be determined on the basis of the supporting and opposing declarations. When the issues involved in the OSC include allegations of a criminal or quasi-criminal nature, however, the defendant cannot be compelled to incriminate himself/herself and, therefore, may not have filed responsive documents. Nevertheless, that defendant is entitled to put on a defense, if he or she deems it appropriate, and address the allegations.

In those cases the standard of proof required for a criminal or quasi-criminal finding must be higher and cannot be solely on the basis of written declaration, as the court must have the opportunity to test the credibility of the witnesses. I would have less of a problem if an exception were carved out to accommodate this type of temporary restraining order.

Yours very truly,



DIANNA J. GOULD-SALTMAN, ESQ.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

**ORDERS TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDERS**

September 1993

**California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739**

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
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September 23, 1993

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation proposes to clarify the time requirements for service and hearing of an order to show cause and temporary restraining order, and to conform the civil harassment provision to general provisions in the Code of Civil Procedure. The recommendation also would provide that a temporary restraining order not brought to hearing within the required time is unenforceable, but the court would nonetheless have authority to hear the order to show cause for injunctive relief.

This recommendation was prepared pursuant to Resolution Chapter 42 of the Statutes of 1984, continued in Resolution Chapter 31 of the Statutes of 1993.

Respectfully submitted,

Sanford M. Skaggs
Chairperson

ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

Nonuniformity in Time for Hearing and Service

The Code of Civil Procedure provides varying times for service and hearing of orders to show cause issued with a temporary restraining order, depending on the type of proceeding. The general statute on injunctive relief provides that the hearing must be held "on the earliest day that the business of the court will admit of, but not later than 15 days . . . from the date of the order."¹ The court may extend this time to 20 days for good cause.² Supporting affidavits and points and authorities must be served not later than two days before the hearing.³ The statute provides no minimum time before the hearing for service of the order to show cause itself, and, by case law, the order to show cause may be served the same day as the hearing.⁴

In a civil harassment proceeding, the 15-day period for the hearing runs from the date the petition was filed, not from the date of the order.⁵ There is no authority in the civil harassment statute for the court to extend this time.⁶ It is unclear whether the general requirement that supporting papers be served at least two days before the hearing applies to a civil harassment proceeding.⁷

There is no apparent reason for different time requirements for various proceedings. These differences cause confusion and uncertainty.⁸ There is also

1. Code Civ. Proc. § 527.

2. *Id.*

3. *Id.*

4. *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 656, 64 P.2d 738 (1937).

5. Code Civ. Proc. § 527.6(d).

6. Code Civ. Proc. § 527.6.

7. See Code Civ. Proc. § 527.6(c). Under the general statute, supporting affidavits and points and authorities must be served on the opposing party at least two days before the hearing. Code Civ. Proc. § 527. But if a civil harassment petition and application for a temporary restraining order are submitted on a Judicial Council form, no memorandum of points and authorities is required. Cal. R. Ct., Rule 363(b). And defendant's response in a civil harassment proceeding must be filed not later than 48 hours before the hearing (Cal. R. Ct., Rule 363(d)), suggesting that service of plaintiff's moving papers on the defendant be made more than two days before the hearing. The statute on notices of motion cannot apply to a civil harassment proceeding, because that statute requires service at least 15 days before the hearing with additional time where notice is served by mail. Code Civ. Proc. § 1005. It is obviously impossible to require notice to the defendant 20 days before the hearing, for example, while requiring the hearing to be held not later than 15 days after the petition was filed.

8. For example, by case law, an order to show cause may be served the same day as the hearing. *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 656, 64 P.2d 738 (1937). The civil harassment statute prescribes no minimum time for service of moving papers on the defendant. See Code Civ. Proc. § 527.6. Judicial Council rules merely require the moving papers to "be personally served on the defendant." Cal. R. Ct., Rule 363. The Judicial Council form for an order to show cause in a civil harassment proceeding requires that the order to show cause and temporary restraining order be served on the opposing party at least two days before the hearing. Judicial Council Form CH-120 (rev. Jan. 1, 1993).

confusion whether general requirements for service of a notice of motion⁹ apply to orders to show cause.¹⁰

The five-day limit on the additional time the court may allow for good cause may cause a problem in small counties that hear orders to show cause only one day a week. In such a case, if the day for hearing orders to show cause falls on a holiday and that is the fifteenth day after issuance of the order, the five-day limit prevents the court from extending the time until its next regular day for hearing orders to show cause.¹¹ The Commission recommends increasing the limit on the additional time the court may allow under the Code of Civil Procedure from five to seven days.

The Commission also recommends one uniform time period for hearing and service of an order to show cause with a temporary restraining order applicable in all proceedings under the Code of Civil Procedure.¹² This should be accomplished by making clear that the time for service is governed by rules applicable to injunctive relief, not general notice of motion provisions, and by conforming the civil harassment statute¹³ to the general statute¹⁴ as follows:

(1) The civil harassment provision should be revised to give the court authority to extend the 15-day time within which the hearing must be held by an additional seven days for good cause.

(2) 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 order.¹⁵

9. Code Civ. Proc. § 1005.

10. It seems reasonably clear the general requirements for service of a notice of motion in Section 1005 of the Code of Civil Procedure do not apply to orders to show cause. Section 1005 requires moving papers to be served and filed at least 15 days before the hearing unless "otherwise ordered or specifically provided by law." Section 527 appears specifically to provide otherwise by requiring a hearing "on the earliest day that the business of the court will admit of" and by requiring affidavits and points and authorities to be served at least two days before the hearing. By case law, the order to show cause may be served the same day as the hearing. *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 656, 64 P.2d 738 (1937). But a leading treatise says an order to show cause and temporary restraining order should be served at least two days before the hearing. Gilbert & Kaplan, *Injunctions*, in 2 California Civil Procedure Before Trial §§ 39.39, 39.43 (Cal. Cont. Ed. Bar 3d ed. 1992). *Accord*, Marshal's Manual of Procedure § 112 (rev. 1/85). 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). This practice means the applicant will either have to obtain an order shortening time for service, or, if the hearing is set 15 days after the date of the order, will have to serve the order to show cause the same day it is issued. These problems were 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).

11. See letter from Judge Joseph B. Harvey to California Law Revision Commission (June 2, 1993) (copy on file in office of California Law Revision Commission).

12. In proceedings under the Family Code, the hearing must be held "on the earliest day that the business of the court will permit, but not later than 20 days" from the date of the order, which the court may extend to 25 days for good cause. Fam. Code § 242, *amended by* 1993 Cal. Stats. ch. 219. The recommended legislation makes no change in the Family Code provisions.

13. Code Civ. Proc. § 527.6.

14. Code Civ. Proc. § 527.

15. 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

(3) The civil harassment provision should be revised to require service to be made at least two days before the hearing, subject to the court's authority to shorten time for good cause.¹⁶

Hearing on Order To Show Cause Despite Failure to Bring Temporary Restraining Order to Hearing Within Required Time

If a temporary restraining order is served but not brought to hearing within the statutory time, it is void.¹⁷ 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.¹⁸ There is no sound reason to make the order to show cause void merely because it is accompanied by an unenforceable temporary restraining order. Instead it should be treated as a notice of motion.¹⁹

The Commission recommends that, if a hearing is not held on an order to show cause accompanied by a temporary restraining order within the prescribed time, the court should still be able to hear the order to show cause, but the temporary restraining order would remain unenforceable.²⁰

opportunity to contest the order. *International Molders & Allied Workers Union, Local 164, AFL-CIO 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.

16. 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, AFL-CIO v. Superior Court*, 70 Cal. App. 3d 395, 407, 138 Cal. Rptr. 794 (1977).

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

18. *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 655, 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 letter from Judge Joseph B. Harvey to San Francisco Daily Journal (August 28, 1992) (copy on file in office of California Law Revision Commission).

19. 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.

20. 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 days or, if good cause appears to the court, ~~20 22~~ 22 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, a copy of each of the following:

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

(2) The order to show cause stating the date, time, and place of the hearing.

(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) The court may for good cause, on motion of the applicant or on its own motion, shorten the time required by subdivision (f) 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 desires it, of not less than 15 days or such shorter period as is requested by the opposing party, to enable him or her the opposing party to meet the application for the preliminary injunction. The defendant opposing party may, in response to an order to show cause, present affidavits relating to the granting of the preliminary injunction, and if 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 upon 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 (f), 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 dissolved three 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 of issued under the Family Code.

(e) (l) There shall be no filing fee for a petition or response relating to a protective order, restraining order, or a permanent injunction restraining violence or threats of violence in any action brought pursuant to this chapter.

Comment. Subdivision (e) of Section 527 is amended to increase from five to seven days the additional time the court may for good cause allow to hear an order to show cause with a temporary restraining order. This permits a court that hears such matters one day a week to extend the hearing until the next regular day for hearing. 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 (f) 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, AFL-CIO 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 (f) is also amended to require the order to show cause to state the date, time, and place of the hearing. This is consistent with Section 1010 (notice of motion must state when it will be made).

Subdivision (g) is added to give the court authority to shorten the time for service. This 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 *Gilbert & Kaplan, Injunctions*, in 2 *California Civil Procedure Before Trial* § 39.43 (Cal. Cont. Ed. Bar 3d ed. 1992).

The other revisions to Section 527 are technical.

Staff note. In the Commission's Tentative Recommendation of May 1993, subdivision (e) of Section 527 was amended to increase the time within which a hearing must be held from 15 to 20 days, and to increase the court's authority to extend the time for hearing to 25 days for good cause. This draft keeps the existing 15-day time requirement, which may be increased to 22 days for good cause.

The Tentative Recommendation of May 1993 required service to 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. This draft keeps the existing requirement that service must be made at least two days before the hearing, without regard for when the hearing is calendared.

This draft adds a provision not in the Tentative Recommendation that the reasonable continuance to which the opposing party is entitled shall be "not less than 15 days or such shorter period as is requested by the opposing party."

Section 527 includes revisions made by AB 284 which has gone to the Governor for signature.

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 or injunction or application therefor 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~~ issued under this section shall remain in effect, at the court's discretion, for a period not to exceed 15 days, or for good cause 22 days, unless otherwise modified, ~~reissued~~, or terminated by the court.

(d) ~~Within 15 days of the filing of the petition 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 any testimony that 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~~ the 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 two days before the hearing. 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 Division 10 (commencing with Section 6200) of the Family Code. Nothing in this section shall preclude a plaintiff's right to ~~utilize~~ use 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 give the court authority to allow an additional seven days for the hearing for good cause. This is consistent with Section 527. 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 (c) is also amended to provide that a temporary restraining order "or injunction or application therefor" under this section is governed by Section 527 except to

the extent this section is inconsistent. This makes clear, for example, that plaintiff's affidavits in support of an application for an injunction under this section must be served on the defendant at least two days before the hearing as provided in Section 527. There is no requirement under this section, as there is under Section 527, that the plaintiff serve points and authorities in support of the application. See also Cal. R. Ct., Rule 363(b) ("unless otherwise ordered no memorandum of points and authorities is required if the petition and the application for temporary restraining order are submitted on a form approved by the Judicial Council").

Subdivision (d) is amended to measure the time within which a hearing must be held from the date the temporary restraining order is issued, rather than from the date of filing of the petition. This is consistent with Section 527 of the Code of Civil Procedure and Section 242 of the Family Code.

The other revisions to Section 527.6 are technical.

Staff note. In the Commission's Tentative Recommendation of May 1993, subdivision (c) of Section 527.6 was amended to increase the time within which a hearing must be held from 15 to 20 days, and to give the court new authority to extend the time for hearing to 25 days for good cause. This draft keeps the existing 15-day time requirement, which may be increased to 22 days for good cause.

The Tentative Recommendation of May 1993 required service to 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. This draft requires service to be made at least two days before the hearing, without regard for when the hearing is calendared.

Section 527.6 is shown as amended by 1993 Cal. Stats. ch. 219 (Family Code cleanup).

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

Staff note. The Commission's Tentative Recommendation of May 1993 proposed to amend Section 243 of the Family Code to require service to 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. This draft makes no changes to the Family Code.