

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT LEG17-03

Title	Action Requested
Proposed Legislation: Temporary Emergency Gun Violence Restraining Orders	Review and submit comments by April 28, 2017
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Pen. Code, §§ 18140 and 18145	January 1, 2019
Proposed by	Contact
Civil and Small Claims Advisory Committee Hon. Raymond M. Cadei, Chair	Jenny Wald, 415-865-8713 jenny.wald@jud.ca.gov

Executive Summary and Origin

The Civil and Small Claims Advisory Committee proposes that the statutes establishing the procedure for obtaining emergency gun violence restraining orders be amended. The amendments would replace the requirement for compliance with procedures for the issuance of oral search warrants under Penal Code section 1526 when these orders are “obtained orally” with the requirement that the law enforcement officer memorialize and sign an affidavit under oath reciting the oral statements provided to the judicial officer. These amendments are intended to clarify the requirements for obtaining these orders and to promote consistency and uniformity by adopting similar requirements that apply to domestic violence cases under the Family Code.

This proposal was developed in response to concerns raised last year by a superior court judge.

Background

Assembly Bill 1014 (Stats. 2014, ch. 872), which became operative on January 1, 2016, established a civil restraining order process to provide law enforcement and immediate family members the means to remove firearms and ammunition from the hands of persons who present a danger to themselves, others, and the public. The legislation follows gun violence laws developed by other states that authorize warrants for the seizure of firearms under specified statutory circumstances. AB 1014 is also modeled in part on California’s Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.; see Pen. Code, §§ 18125–18145, 18150–18165, and 18170–18197.)

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

Penal Code section 18145(a)(1) requires that a temporary emergency gun violence restraining order (GVRO) “shall be obtained by submitting a written petition to the court.” However, under subdivision (a)(2), if “time and circumstances” do not permit the submission of a written petition, the court may issue the order “in accordance with the procedures for obtaining an oral search warrant” under Penal Code section 1526(b). Subdivision (b) requires that the warrant issue on an “oral statement under oath” that is recorded or transcribed under alternative conditions.¹

In contrast, under Family Code section 6241, a judicial officer is authorized to grant a domestic violence emergency protective order (EPO) “*orally, by telephone or otherwise, . . . at all times whether or not the court is in session*” (italics added). To obtain an EPO under the DVPA, the law enforcement officer is *not required* to submit a written petition or an affidavit, or to provide an oral statement under oath. All that is required is the officer’s *oral assertion* that “reasonable grounds” exist for issuance of the domestic violence EPO.²

Although it does not explicitly so state, form EPO-002, *Firearms Emergency Protective Order*, is intended to implement the process under Penal Code section 18145(a)(2) for obtaining an emergency GVRO orally. One of the concerns raised by the superior court judge is whether that form can serve as the written petition submitted to the court for purposes of Penal Code section 18145(a)(1). The other concern raised is that the form does not indicate compliance with the requirement of Penal Code section 18145(a)(2) for following the procedures of Penal Code section 1526 relating to oral search warrants if the order is obtained orally.

In response to the judge’s second concern, the committee proposes amending Penal Code section 18145(a) and 18140(a). The proposal maintains the requirement for submission of a “written petition” under Penal Code section 18145(a)(1). However, the proposal would replace the requirement of Penal Code section 18145(a)(2) that oral requests be obtained according to the procedures for oral search warrant procedures under Probate Code section 1526 with requirements that the law enforcement officer memorialize and sign an affidavit under oath reciting the oral statements provided to the judicial officer that are the basis for the emergency order.

The Proposal

The proposal recommends:

- Amending subdivision (a)(1) of Penal Code section 18145 to clarify that the petition shall be “made in writing” and “based on a signed affidavit submitted to a judicial officer.”

¹ “In lieu of the written affidavit required in subdivision (a), the magistrate *may take an oral statement under oath* under one of the following conditions: ¶ (1) The oath shall be made under penalty of perjury and *recorded and transcribed*. The *transcribed statement shall be deemed to be an affidavit* for the purposes of this chapter.” Pen. Code, § 1526(b), italics added.

² See form EPO-001, *Emergency Protective Order (CLETS-EPO)*; Fam. Code, § 6250.

- Amending subdivision (a)(2) of Penal Code section 18145 to provide that a temporary emergency GVRO may issue “orally by a judicial officer based on the statements of a law enforcement officer in accordance with subdivision (a) of Section 18140.”
- Amending subdivision (a) of Penal Code section 18140 to require that the law enforcement officer “memorialize and sign an affidavit under oath reciting the oral statements provided to the judicial officer.”

The proposed amendments would resolve the concern that form EPO-002 does not include language to indicate compliance with the existing Penal Code section 18145(a)(2) requirement for following the Penal Code section 1526 procedure to obtain oral search warrants if the order is obtained orally. The amendments would also clarify the process for issuance of temporary emergency GVROs and eliminate the complicated procedures that may confuse parties and interfere with the court’s ability to efficiently process and issue emergency orders. Further, it would promote consistency and uniformity by adopting similar requirements specified by the Legislature that apply to emergency orders obtained orally in domestic violence cases under Family Code section 6241.

The proposal retains the essential requirements of the original statutes. Specifically, subdivisions (a)(1) and (a)(2) of Penal Code section 18145 are structured on the procedures for issuance of search warrants under subdivisions (a) and (b) of Penal Code section 1526. The key requirement here is that the warrant must issue on a statement made in a “signed affidavit” in writing or an “oral statement under oath” that is “recorded and transcribed.”³

Alternatives Considered

The committee considered creating a separate form for the written petition to implement the requirement of Penal Code section 18145(a)(1). The committee concluded that a separate form is not necessary, because the existing form EPO-002 complies with the statutory requirements for use as a written petition submitted to the court. The committee also reviewed a proposal for revisions to the form intended to satisfy the requirements of Penal Code section 18145(a)(2) for orders obtained orally. Specifically, the revisions were to expressly indicate on the form that the officer complied with the statute and that the “oral statements” were made to the judicial officer “under oath.” The committee decided not to recommend this proposal.

Implementation Requirements, Costs, and Operational Impacts

The purpose of the proposal is to clarify the procedures and statutory requirements for issuance of temporary emergency GVROs. There may be one-time costs associated with updating educational and/or practice guide materials.

³ Pen. Code, § 1526(b) enumerates alternative conditions for the oral statements to be recorded and transcribed. The “sworn oral statement” may be recorded by a court reporter, and a certified transcript filed with the clerk of the court; or the oath may be made during a telephone conversation, with the affiant’s signature in the form of a digital signature or an electronic signature if transmitted by email, and with the magistrate confirming receipt.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts?
- Would a separate Judicial Council form be useful to implement the requirement under Penal Code section 18145(a)(1) for the submission of a “written petition” to the court? (Please describe).

Attachments and Links

1. Penal Code sections 18140 and 18145, at page 5

Penal Code sections 18140 and 18145 would be amended, effective January 1, 2019, to read:

1 **§ 18140. Requirements for law enforcement officer seeking order**
2

3 A law enforcement officer who requests a temporary emergency gun violence restraining
4 order shall do all of the following:

- 5
- 6 (a) If the order is obtained orally, memorialize and sign an affidavit under oath reciting
7 the oral statements provided to the judicial officer and memorialize the order of the
8 court on the form approved by the Judicial Council.
 - 9
 - 10 (b) Serve the order on the restrained person, if the restrained person can reasonably be
11 located.
 - 12
 - 13 (c) File a copy of the order with the court as soon as practicable after issuance.
 - 14
 - 15 (d) Have the order entered into the computer database system for protective and
16 restraining orders maintained by the Department of Justice.
 - 17
 - 18

19 **§ 18145. Petition; Designation of judge to issue orders**
20

- 21 (a)
- 22 (1) Except as provided in paragraph (2), the petition for a temporary emergency
23 gun violence restraining order shall be ~~obtained by submitting a written~~
24 ~~petition to the court~~ in writing and based on a signed affidavit submitted to a
25 judicial officer.
 - 26
 - 27 (2) If time and circumstances do not permit the submission of a written petition,
28 a temporary emergency gun violence restraining order may be issued ~~in~~
29 ~~accordance with the procedures for obtaining an oral search warrant~~
30 ~~described in Section 1526~~ orally by a judicial officer based on the statements
31 of a law enforcement officer in accordance with subdivision (a) of Section
32 18140.
 - 33
- 34 (b) The presiding judge of the superior court of each county shall designate at least one
35 judge, commissioner, or referee who shall be reasonably available to issue
36 temporary emergency gun violence restraining orders when the court is not in
37 session.
38