



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 16–17, 2017

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Title	Agenda Item Type
Judicial Council–Sponsored Legislation: Temporary Emergency Gun Violence Restraining Orders	Action Required
Rules, Forms, Standards, or Statutes Affected Amend Pen. Code, §§ 18140 and 18145	Effective Date November 17, 2017
Recommended by Policy Coordination and Liaison Committee Hon. Kenneth K. So, Chair Civil and Small Claims Advisory Committee Hon. Ann I. Jones, Chair	Date of Report September 15, 2017
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### Executive Summary

The Policy Coordination and Liaison Committee and the Civil and Small Claims Advisory Committee recommend that the Judicial Council sponsor legislation to amend the statutes setting forth the procedure for issuing a temporary emergency gun violence restraining order, specifically Penal Code sections 18140 and 18145. The amendments would replace the procedural requirement for obtaining an order orally with requirements set forth directly within the gun violence prevention statutes, which would parallel the requirements for emergency orders obtained in domestic violence cases and clarify the procedures for law enforcement officers and the court to follow. This change, which was initiated as the result of concerns expressed by a judicial officer as to whether the current procedure complied with the statute, would not in any way change the factual assertions required of the officer or the findings required of the judicial officer for the order to issue.

## Recommendation

The Policy Coordination and Liaison Committee and the Civil and Small Claims Advisory Committee recommend that the Judicial Council sponsor legislation to:

1. Amend subdivision (a) of Penal Code section 18145 by switching the order of current paragraphs (1) and (2) to place *oral* issuance of emergency orders in the primary position with a written process authorized if time and circumstances permit.
2. Further amend subdivision (a) of Penal Code section 18145 to provide that a judicial officer may orally issue an emergency order based on the statements of a law enforcement officer in accordance with the amended subdivision (a) of Penal Code section 18140.
3. Amend subdivision (a) of Penal Code section 18140 to require that, if the emergency order is obtained orally, the law enforcement officer “sign a declaration under penalty of perjury reciting the oral statements provided to the judicial officer” on the Judicial Council form, as well as memorialize the order, as already required.

The text of the proposed amended statutes is attached at page 7.

## Previous Council Action

Assembly Bill 1014 (Skinner; 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. Despite the location of the statutes in the Penal Code (see Pen. Code, § 18100 et seq.),<sup>1</sup> the statutes expressly provided that the process to obtain a gun violence restraining order is to be considered a civil proceeding.

By statute, the Judicial Council must prescribe the form of the petitions and orders and any other documents necessary to implement the new law. (See § 18104.) The council adopted a series of gun violence restraining order forms in 2016. The forms adopted included one for law enforcement officers to use in obtaining and enforcing a temporary gun violence restraining order, the *Firearms Emergency Protective Order* (form EPO-002). That order was modeled after the already existing *Emergency Protective Order* (form EPO-001), used for immediate issuance of emergency orders in domestic violence cases. The statutes that present the procedures for obtaining this EPO are addressed in this recommendation.

In 2017, the Judicial Council sponsored AB 1443 (Levine; Stats. 2017, ch. 172) which, among other things, establishes a record retention period for gun violence restraining orders.

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<sup>1</sup> Unless otherwise noted, all statutory references in this report are to the Penal Code.

## Rationale for Recommendation

### Background

AB 1014 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. (Cf. Fam. Code, § 6200 et seq.; Pen. Code, §§ 18125–18197.)

A temporary emergency gun violence restraining order (EPO) may be issued only on the request of a law enforcement officer and only when the officer has shown, and the judicial officer has found, that there is reasonable cause to believe that an immediate and present danger exists of the subject causing injury to himself or herself or others through use of firearms. (§ 18125.) The EPO expires 21 days from issuance. (*Id.*) It must contain a statement of the grounds for supporting the issuance of the order and the date and time it expires, along with information about the possibility of a more permanent order being obtained and the address of the applicable court. (§ 18135.)

EPOs are generally obtained by a law enforcement officer in the field dealing with the circumstances of the immediate and present danger that is the basis for the order. The current statute appears to be based, at least in one section, on the assumption that the order will be obtained orally,<sup>2</sup> outside the courthouse setting, because it mandates that the officer “file a copy of the order with the court as soon as possible after issuance.” (§ 18140(c).)

Notwithstanding the assumption underlying section 18140(c) that firearms EPOs will generally be obtained orally, section 18145(a) provides that such orders shall be obtained via written petition, unless time and circumstances do not permit preparing and filing a written petition.

When the order is obtained orally—as in practice it almost always is—the statute currently provides that it should be issued in accordance with the procedures for obtaining an oral search warrant under section 1526. Subdivision (b) of section 1526, providing for issuing warrants orally, requires that the warrant be issued on an oral statement under oath that is either recorded at the courthouse (either by a machine or a court reporter) and transcribed or put into writing after it has been made over the phone and then transmitted to the judicial officer over fax or e-mail prior to the issuance of the warrant. Section 1526 also requires that the warrant then be issued by the judicial officer and faxed or transmitted by e-mail back to the law enforcement officer. The committee is concerned that these procedures, which are very different from those used for issuance of domestic violence EPOs, are too burdensome for use with these firearms EPOs.

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<sup>2</sup> Obtaining an order orally means that the judicial officer approves the order over the phone in a conversation with a law enforcement officer in the field.

Some concerns have been voiced by at least one judicial officer as to whether the current *Firearms Emergency Protective Order* (form EPO-002) is in compliance with the gun violence restraining order statutes, as it does not act as a written petition and does not reference the provisions for obtaining a search warrant orally. This judge raised concerns that, as a result, there is confusion in the implementation of the statute and the issuance of firearms EPOs. In light of these concerns, as well as of the ambiguity in the statute,<sup>3</sup> the Policy Coordination and Liaison Committee and the Civil and Small Claims Advisory Committee recommend that the council sponsor legislation to amend the statutes to clarify the procedures and, at the same time, make them more consistent with the procedures used for EPOs in domestic violence cases,<sup>4</sup> while still requiring a statement by the law enforcement officer under oath as currently required by the statute.

### **Recommended amendments**

The amendments would clarify the process for issuance of temporary emergency gun violence restraining orders and further the court's ability to efficiently process and issue emergency orders. Making the oral procedures the primary procedure in the statute reflects the reality of how these orders are issued: obtaining a firearms EPO is generally done over the phone, requested by a law enforcement officer in the field dealing with a situation in which someone poses an *immediate and present danger* of causing harm to himself or herself, or others. It is hard to see how time and circumstances would allow the officer to present a written form to a judicial officer at the courthouse, particularly as the default procedure.

The amendments would also promote consistency and uniformity by adopting requirements similar to those specified by the Legislature for EPOs obtained orally in domestic violence cases under Family Code section 6241.

The amendments would also provide that a declaration under penalty of perjury would be required should time and circumstances permit a written petition. (Recommended § 18145(a)(2).)

The proposal retains the essential requirements of the original statutes. Specifically, the oral statements that the law enforcement officer seeking the order makes to the judicial officer must be declared under penalty of perjury on the order form eventually filed with the court—a parallel to the requirement of statements under oath for oral issue of search warrants. (Cf. § 1526(b) (law

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<sup>3</sup> Compare the underlying assumption in section 18140(c) that the emergency orders will be obtained orally and later filed with the court, with the *default* in section 18145(a) that they be obtained by written petition.

<sup>4</sup> Under Family Code section 6241, a judicial officer is authorized to grant a domestic violence EPO orally. To obtain an EPO under the Domestic Violence Prevention Act, the law enforcement officer is not required to submit a written petition or affidavit, or even to provide the oral statement under oath. All that is required is the officer's oral assertion that he or she has reasonable grounds for believing a person is in immediate and present danger of domestic violence, abuse, or abduction. See *Emergency Protective Order (CLETS-EPO)* (form EPO-001) and Fam. Code, § 6250.

enforcement officer statement made by telephone and recorded or sent in to court in writing via fax or e-mail).)

## **Comments, Alternatives Considered, and Policy Implications**

### **External comments**

The Civil and Small Claims Advisory Committee (committee) circulated proposed amendments in spring 2017 for comments. The circulated proposal provided that the emergency orders could be issued orally based on oral statements that the law enforcement officer memorialized under penalty of perjury on the Judicial Council order form. Four commenters provided feedback: the Orange County Bar Association and the Superior Courts of Los Angeles, San Diego, and Ventura Counties.

A specific question of whether to develop a written petition form was included in the Invitation to Comment. Only one commenter responded to that point, the Superior Court of San Diego County, which stated no.

The Orange County Bar Association agreed with the proposed amendments and recognized that form EPO-002 may be out of compliance with section 18145 as it currently reads. The purpose behind this recommendation is to address this situation. The committee notes that there were no other comments on this point, neither endorsing nor opposing bringing the statutes in line with the process behind the form.

The commenter also noted that the essentials for warrant issuance are retained under the amendments because the law enforcement officer must still make a statement under oath that is recorded (on the EPO form, in the event of an oral application).

The Superior Court of Los Angeles County agreed with the recommendation if modified, asking that courts be allowed the alternative of issuing the oral emergency order based *either* on the oral statements of the law enforcement officer that are put into writing under penalty of perjury on the EPO form, or on the oral statements made in accordance with the search warrant procedures. The committee believes that leaving reference to the search warrant procedure in the statute would prove confusing to law enforcement. However, the committee believes that the process for obtaining a search warrant is too cumbersome to be used in the field at the scene of an emergency. (See § 18125(a)(1) [“The subject of the petition poses an immediate and present danger of causing personal injury to himself, herself, or another”].)

Under the process envisioned by the drafting group for the gun violence restraining order forms, the officer at the scene of an emergency would call the duty judge from the cruiser, read the statement of facts entered on form EPO-002, and get an oral approval from the judge. The officer would then complete the form, serve it immediately on the respondent, and seize the firearms.

The Superior Court of San Diego County agreed with the proposed amendments. While answering no to the question of whether a written petition form should be developed, it raised the

suggestion that a space for a judicial officer's signature should be included on form EPO-002. The committee declines to add a signature line at this point. The committee agrees that a separate Judicial Council form would not be useful because there would seldom be time to present a written petition to the court in an emergency situation. The committee does not believe that the form needs a line for the judge's signature as the judge's approval will almost always be obtained orally, and therefore the line on the EPO form will almost always be blank. Also, there is currently no room on the form for any additional lines.

### **Internal comments**

In considering the comments, particularly the lack of comments seeking a separate written petition form, and further reviewing the proposed amendments, the committee concluded that one amendment not made in the original circulation should be considered: switching the order of paragraphs (1) and (2) of section 18145(a) so that the process for orally issuing an emergency order comes first, with the process for a written request provided for in the event there are instances when time and circumstances would permit such a process. The committee concluded that because the vast majority of emergency temporary gun violence protective orders are issued orally, it would make the statute less confusing to be ordered in this way.

### **Alternatives**

The committee considered creating a separate form for a written petition to implement the requirement of current section 18145(a)(1), and posed the question on the Invitation to Comment as to whether a written petition form should be developed. No commenter indicated any need or desire for a written petition form. The committee believes that the existing form EPO-002 is sufficient.

The committee also considered some revisions to form EPO-002 intended to satisfy current section 18145(a)(2), which provides that orders obtained orally be issued in accordance with the procedures for obtaining oral search warrants. The committee decided not to recommend this proposal but instead recommend a more comprehensive change to the statutory procedures themselves, in order to obtain greater clarity and to lessen the burdens on the courts.

### **Implementation Requirements, Costs, and Operational Impacts**

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

### **Attachments and Links**

1. Penal Code sections 18140 and 18145, at page 7
2. Chart of comments, at page 8–12

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 a declaration under penalty of  
7 perjury reciting the oral statements provided to the judicial officer and memorialize  
8 the order of the 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 **§ 18145. Petition; Designation of judge to issue orders**

- 19  
20 (a)
- 21 (1) ~~Except as provided in paragraph (2), the petition for~~ A judicial officer may  
22 issue a temporary emergency gun violence restraining order shall be obtained  
23 by submitting a written petition to the court orally based on the statements of  
24 a law enforcement officer in accordance with subdivision (a) of Section  
25 18140.  
26  
27  
28 (2) If time and circumstances ~~do not permit the submission of a written petition,~~  
29 a temporary emergency gun violence restraining order may be ~~issued in~~  
30 ~~accordance with the procedures for obtaining an oral search warrant~~  
31 ~~described in Section 1526~~ obtained in writing and based on a declaration  
32 signed under penalty of perjury.  
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

**LEG17-03**

**Proposed Legislation: Temporary Emergency Gun Violence Restraining Orders**

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Orange County Bar Association by Michael L. Baroni, President	A	<p>AB 1014 enacted Penal Code §§ 18100 et. seq.. These sections established a Gun Violence Restraining Order (GVRO) using a civil restraining order process. The GVRO is used to remove guns and ammunition from one who is a danger to themselves or others by a petition from law enforcement or family members. Penal Code §18145(a)(1) requires that a temporary emergency GVRO “shall be obtained by submitting a written petition to the court.” However, pursuant to Family Code §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”. Unlike the Penal Code sections, a law enforcement officer is <u>not</u> required to submit a written petition or an affidavit, or to provide an oral statement under oath. Moreover, it is debatable whether Form EPO-002, the Firearms Emergency Protective Order used for the GVRO, is in compliance with §18145(a)(1).</p> <p>In order to promote consistency and resolve ambiguity between the Penal and Family Law code sections, Judicial Council proposes three statutory amendments:</p> <ul style="list-style-type: none"> <li>•Amend subdivision (a)(1) of Penal Code</li> </ul>	<p>The committee acknowledges the commenter’s agreement with the proposal. The committee notes that the commentator recognizes that the EPO-002 may be out of compliance with Penal Code section 18145 as it currently reads. The purpose behind this proposal is to address this situation. The committee further notes that there were no other comments on this point, neither endorsing nor opposing bringing the statutes in line with the process behind the form.</p>



**LEG17-03****Proposed Legislation: Temporary Emergency Gun Violence Restraining Orders**

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>section 18145 to clarify that the petition shall be “made in writing” and “based on a signed affidavit submitted to a judicial officer.”</p> <ul style="list-style-type: none"> <li>•Amend 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.”</li> <li>•Amend 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.”</li> </ul> <p>The proposed amendments appropriately address the stated purpose. The proposed subdivisions (a)(1) and (a)(2) of Penal Code section 18145 are based on the procedures for the issuance of search warrants under Penal Code §§1526(a) and (b). The essentials for warrant issuance are retained as a statement must be made in a “signed affidavit” in writing or an “oral statement under oath” that is “recorded and transcribed.”</p>	
2.	Superior Court of Los Angeles County	AM	The proposed change to Penal Code, Section 18145(a)(2) deletes the language	The committee believes that leaving reference to the search warrant procedure in the statute would

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>incorporating Penal Code, Section 1526. That section provides an alternative to obtaining a telephonic search warrant in which the sworn statement is audio recorded and then transcribed. (Penal Code, Section 1526(b)(1).) By deleting this language, this alternative is not available for a GVRO.</p> <p>It is not clear why we would eliminate the option of a telephonic warrant which is recorded and then transcribed. From a policy perspective it is best to provide more options for obtaining a GVRO under emergency situations. In addition, the elimination of the audio recorded statement procedure may be confusing to law enforcement since this option will remain viable for traditional search warrants.</p> <p>Instead the statute should read that a GVRO “may be issued in accordance with the procedures for obtaining an oral search warrant described in Section 1526 or orally by a judicial officer based on the statements of a law enforcement officer in accordance with subdivision (a) of Section 18140.”</p>	<p>prove confusing to law enforcement. The committee believes that the process for obtaining a search warrant are too cumbersome to be used in the field at the scene of an emergency. (See Pen. Code, § 18125(a)(1) [“The subject of the petition poses an immediate and present danger of causing personal injury to himself, herself, or another”].) Under the process envisioned by the drafting group for the Gun Violence forms, the officer at the scene of an emergency will call the duty judge from the cruiser, reads the statement of facts entered on the EPO-002, and gets an oral approval from the judge. The officer will then complete the EPO-002, serve it immediately on the respondent, and seize the firearms.</p>
3.	Superior Court of San Diego County by Mike Roddy, Executive Officer	A	<p>Q: Does the proposal appropriately address the stated purpose? A: Yes.</p> <p>Q: Would the proposal provide cost</p>	The committee acknowledges the commenter’s agreement with the proposal.

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>savings? If so, please quantify. A: No.</p> <p>Q: 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). A: No. However, the current EPO-002 should be modified to include an option for a judicial officer’s signature for requests submitted during business hours.</p>	<p>The committee agrees that a separate Judicial Council form would not be useful because there would seldom, if ever, be time to present a written petition to the court in an emergency situation. The committee does not believe that the form needs a line for the judge’s signature as the judge’s approval will almost always be obtained orally. Also, there is currently no room on the form for any additional lines.</p>
4.	Superior Court of Ventura County by Julie Camacho, Court Manager	AM	<p>Agree with the proposed changes but request additional information/clarification. Penal Code Section 18140(c) directs the law enforcement officer requesting the emergency gun violence restraining order to "File a copy of the order with the court as soon as practicable after issuance." The EPO forms, including the EPO-002 form, do not have a place for the court staff to "file stamp" the document. In the Ventura Superior Court, the form is stamped with a date of receipt stamp, but is not filed.</p> <p>Also, if the document is to be filed with the court, shouldn't the original EPO form be submitted and not a copy as stated in PC 18140? It is this court's experience with the domestic violence EPO forms that the law</p>	<p>The committee acknowledges the commenter’s agreement with the proposal. The commentator raises some valid questions, but they are not pertinent to the current proposal.</p> <p>The EPO-002 does not initiate a proceeding for a permanent order; only the GV-100 petition does that. The statutes do not currently address what a court should do with EPOs after they expire. Most likely, whatever disposition the courts currently make of their EPO-001 (domestic violence emergency orders) would be appropriate for the EPO-002’s also. .</p> <p>The reasonable conclusion is that the original will be served on the respondent. As noted in the comment, statutes require the filing of a copy. It is not clear why law enforcement would be submitting originals of the EPO-001.</p>

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**Proposed Legislation: Temporary Emergency Gun Violence Restraining Orders**

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>enforcement agencies are submitting the original form to the court.</p> <p>In addition, Government Code Section 68152(a)(6) states the retention period of the Civil Harassment, Domestic Violence, Elder and Dependent Adult Abuse, Private Postsecondary School Violence and Workplace Violence temporary restraining orders, which would include the EPO temporary orders. Should the Gun Violence Restraining Orders be added to this section to provide the court a time line for retention of both the EPO's, TRO's and Orders After Hearing?</p>	<p>The committee agrees that Gov. Code 68152 be amended to add Gun Violence orders to the retention of records requirements, but the suggestion is outside the scope of this proposal. The committee will refer the suggestion to the appropriate advisory committee for future consideration.</p>