

# 2016 Annual Child Support Training Conference & Expo



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**May 3–5, 2016 » Garden Grove, California**

CHILD SUPPORT DIRECTORS ASSOCIATION OF CALIFORNIA

2016 Annual Child Support  
Training Conference & Expo

# Contempt – The Right Tool for the Right Case

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# 2016 Annual Child Support Training Conference & Expo

**CONTEMPT - PART I:**

# **POLICY CONSIDERATIONS**

# BACKGROUND AND CONTEXT

The District Attorney years:

- Ceased Criminal actions early 1990's
  - CA Penal Code § 270 non-support
- Never filed Criminal Contempts under Penal Code § 166
- Filed "Quasi-criminal" contempts under Code of Civil Procedure § 1209
- Filed almost as many against Employers as Non-Custodial Parents

# BACKGROUND AND CONTEXT

Transition to new agency:

Department of Child Support Services

Statewide transition 2000 through 2002

Organizational and structural changes

State oversight

Culture shock—

Participants, clients, and “Customer Service”

DDA’s to CSA’s

Non-attorney Directors

# To Use Contempt or Not to Use?

## Issues to consider:

1. Cost-effectiveness
2. Case management
3. Chilling effect
4. Disparate Impact

# Are contempt costs effective?

- Revelatory post-transition article
- Costs: LCSA, Court, Society
- Preparation and prosecution
  - Attorneys, caseworkers, clerical
  - Court time: Commissioners, court clerks, reporters, attendants/bailiffs, filing clerks
- Incarceration costs for civil inmate
- Social costs for incarceration
  - Family
  - Child

# Jobs not Jail

**WORK-ORIENTED SERVICES** help parents find work, stay employed, pay child support, and avoid crime - at relatively little cost. Unemployed parents who are behind in their child support payments are referred to a work-oriented program.

**WITH JOB SERVICES, A STUDY SHOWS<sup>1</sup>**

- Over 80% find work within 2 months
- Participants are 33% less likely to file unemployment
- Participants paid 51% more in child support
- Families are 21% less likely to receive public assistance

**Costs \$5/day<sup>3</sup>**

- Skills assessment
- Debt management
- Job search assistance
- Job placement
- Follow-up monitoring and support

**\$4,000 child support paid<sup>5</sup>**

**JAIL** is more expensive and less effective in producing child support payments than alternatives such as job services. Research shows that jail reduces a person's ability to work, to find work, to be employable, and to make child support payments.

**AFTER JAIL RELEASE, A STUDY SHOWS<sup>2</sup>**

- Individuals are unemployed 9 weeks more per year
- Annual earnings are reduced by 40%
- Hourly wages are 41% less
- Annual family income is reduced by 22%

**Costs \$186/day<sup>4</sup>**

- Loss of job opportunities
- New barriers to future work
- Uncollectible debt
- Loss of contact with children
- Other collateral consequences

**\$0 child support paid**

**“** Now I have someone to help [me] to find work... I was worried about going to jail. I was afraid of not seeing my kids -  
— Job services participant

**“** I feel like it's more unfair to the kids, because now not only do kids not get any money, nor do they even get to spend time with their fathers once they get locked up.  
— Iraq War veteran and parent

**Securing regular child support payments for families is the goal of the federal Office of Child Support Enforcement.**  
These states connect noncustodial parents to job services.

<sup>1</sup> Schneider, K., & Doughty, N. (2009). Texas Non-Custodial Parent Choices: Program Impact Analysis. Ray Marshall Center for the Study of Human Resources, University of Texas, Austin. [http://www.utexas.edu/research/cslr/pubs/pdf/NCP\\_choices\\_Final\\_03\\_2009.pdf](http://www.utexas.edu/research/cslr/pubs/pdf/NCP_choices_Final_03_2009.pdf)

<sup>2</sup> The Pew Charitable Trusts. (2010, September). Collateral Costs: Incarceration's Effect on Economic Mobility. [http://www.pewtrusts.org//media/legacy/uploads/files/pcs\\_assets/2010\\_collateral\\_costs.pdf](http://www.pewtrusts.org//media/legacy/uploads/files/pcs_assets/2010_collateral_costs.pdf)

<sup>3</sup> OCSE used participant expenditure data from the Texas study in footnote 1 to calculate the average daily cost of job services per participant.

<sup>4</sup> OCSE used Vera Institute of Justice 2014 survey data from 35 survey sites to calculate the average daily cost of jail. <http://www.vera.org/pubs/price-of-jail>

<sup>5</sup> Hayes, M., & Venier, N. (2010, July). NCP Choices: Non-Custodial Parent Employment Program. Presented at the Client Success through Partnership: 2010 State TANF and Welfare Meeting, Dallas, TX. <https://www.billywonib.com.org/view/2010/351403520152658>

OFFICE OF CHILD SUPPORT ENFORCEMENT OCTOBER 2015



## Jobs not Jail

Jail is more expensive and less effective in producing child support payments than alternatives such as job services. Research shows that jail reduces a person's ability to work, to find work, to be employable, and to make child support payments."

--Office of Child Support Enforcement

# Jail

## **Jail costs \$ 186/day:**

Loss of job opportunities

New barriers to future work

Uncollectible debt

Loss of contact with children

Other collateral consequences

# Job Services

## **Costs \$ 5/day**

Over 80 % find work within 2 months

Participants are 33 % less likely to file unemployment

Participants paid 51 % more in child support

Families are 21 % less likely to receive public assistance

# Shasta County two-year study

424 actions successfully served

--generally 50%

Average collection year prior: \$ 595

Average collection year after contempt: \$ 1,036

74 % increase

\$ 441 per case

\$ 186,984 total increase

Developed rating sheet from case characteristics

--screened out 35 % of referrals

--kept 65 % most likely for success

# Considerations

Service cost (Alameda): \$ 30 per serve

Cost of successful serves only: \$ 25,440

Case preparation costs successful serves only\*:

Caseworker \$ 25, Clerical \$ 17, Attorney \$ 56

Total prep (1 hour each)-- \$ 41,442

Total prep and serve-- \$ 108,434

Net increase-- \$ 78,550

Cost effectiveness for increase: \$ 1.72

Court time

Commissioner, Court Clerk, Reporter, Bailiff, Filing Clerk

Bench Warrants—processing and service costs

Appointed counsel—Public Defender or private panel

Follow-up: purge appearances, trials, probation reviews

\*Salary.com

# Are contempts effective case management?

Short-term v. long-term results

Multiple contempts and “baby-sitting”

- Contempts as IWO's

- Other robust, viable enforcement tools

- Evading NP's converted by contempt?

Tendency to become tool of first resort

- Short-cuts good casework and relationship-building

Incarceration, employability and credibility

# Do contempts have chilling effect?

Since transition from D.A., a transition in values—

Customer focus

Family-centered

Service-oriented

Emphasis on participation

Pull v. push

Invitation v. threats

Public interest = family interest

# Values are what you do, not what you say

**Example**--Enron's stated values were:

*Integrity*

*Respect*

*Excellence*

*Communication*

But its leaders went to jail for fraud and Enron went bankrupt

--because their conduct did not match their words



# Chilling effect on everyone in the Program?

- Undercuts collaborative efforts and invitations to full participation
  - What if you were NP's attorney?
- Subverts "family-centered" perspective and best interest of children
  - It is NEVER in the best interest of a child to have a father in jail
- Read the NP advocates and seriously consider their perception of child support agencies
- Walter Scott's death

# Disparate Impact

## Definition:

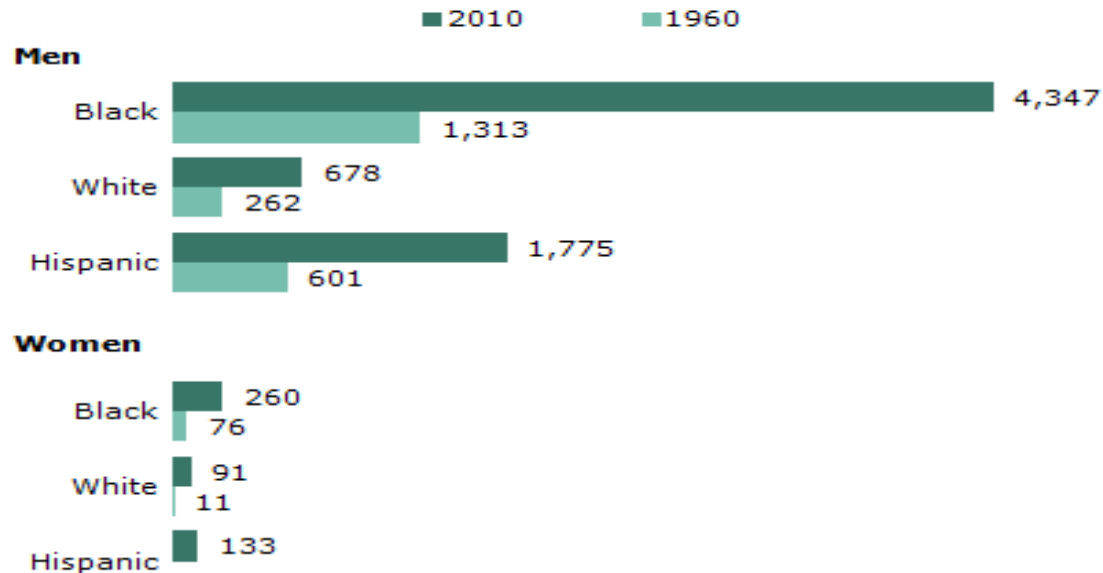
The adverse effect of a facially neutral practice that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity. Discriminatory intent is irrelevant.

--Black's Law Dictionary

# Incarceration rates 1960 and 2010

## Incarceration Rates, 1960 and 2010

*Inmates per 100,000 U.S. residents*



Note: Incarceration rates are for total prisoners in local, state and federal correctional facilities. Total prisoners includes persons under age 18. Hispanics are of any race. Whites and blacks include only non-Hispanics. In 2010, whites and blacks include only those who reported a single race. Asians, Native Americans and mixed-race groups not shown. A figure for Hispanic women in 1960 is not shown due to small sample size.

Source: For 1960, Pew Research Center analysis of Decennial Census data (IPUMS); for 2010, Bureau of Justice Statistics data <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>

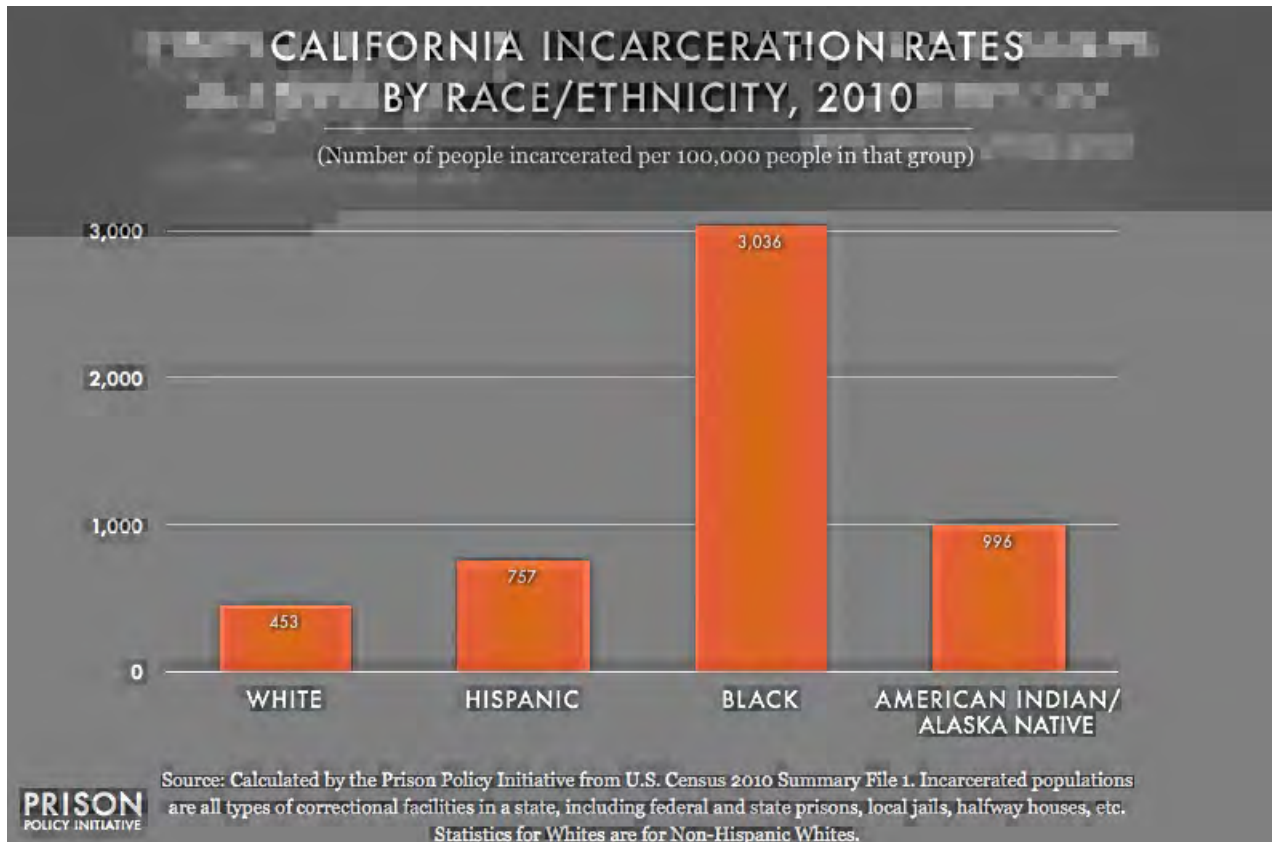
PEW RESEARCH CENTER

# Incarceration disparities

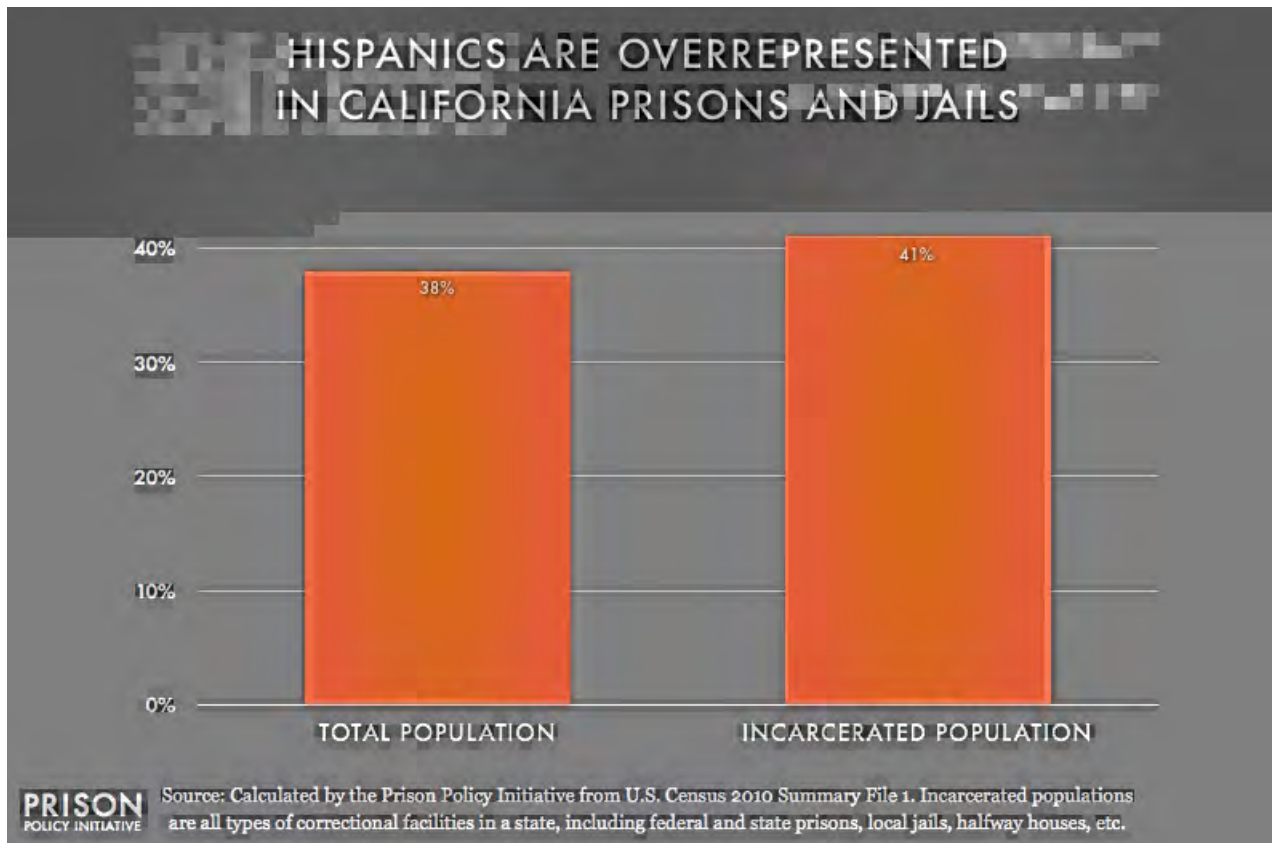
Together, African Americans and Hispanics comprised 58% of all prisoners in 2008, even though African Americans and Hispanics make up approximately one quarter of the US population

2015 National Association for the Advancement of Colored People

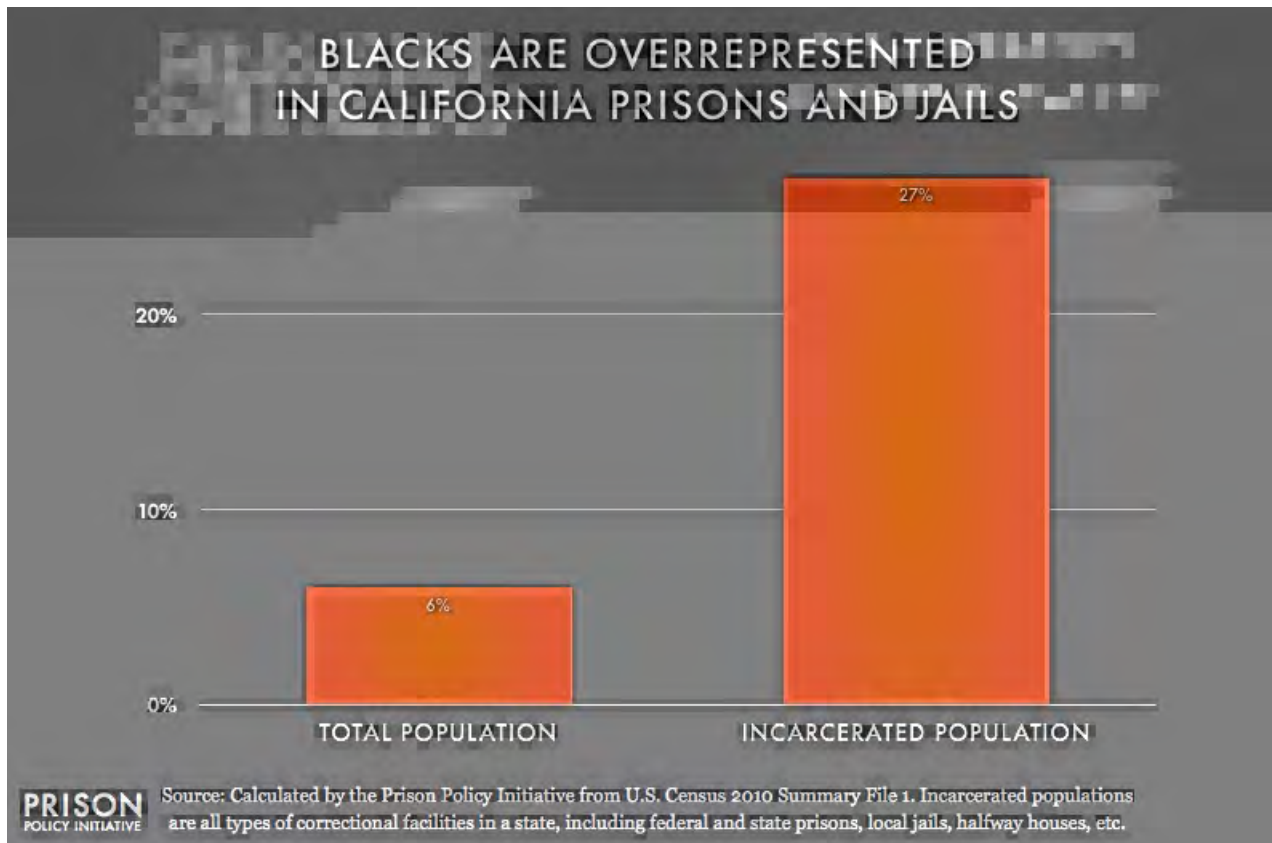
# Incarceration in California



# Incarceration in California



# Incarceration in California



# Income disparities after incarceration

**Studies have shown that people of color face disparities in wage trajectory following release from prison.**

Evidence shows that spending time in prison affects wage trajectories with a disproportionate impact on black men and women. The results show no evidence of racial divergence in wages prior to incarceration; however, following release from prison, wages grow at a 21 percent slower rate for black former inmates compared to white ex-convicts.

**Compounded Disadvantage: Race, Incarceration, and Wage Growth**

Christopher J. Lyons and Becky Pettit, *Social Problems* Vol. 58, No. 2 (May 2011), pp. 257-280

Published by: Oxford University Press



# Disparate impact

Disparate impact is of Constitutional concern.

Most recent U.S. Supreme Court decision concerned the Fair Housing Act: Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. (2015)

“... a disparate-impact claim challenges practices that have a ‘disproportionately adverse effect on minorities’ and are otherwise unjustified by a legitimate rationale.”

Do current social, cultural & caseload realities make disparate impact more likely than not, based upon race and gender?

# Office of Child Support Enforcement

Action Transmittal (AT) 12-01:

## Turner v. Rogers Guidance

Analyzes *Turner v. Rogers*, 131 S.Ct. 2507 (2011) and provides guidance to the States.

Three specific recommendations:

1. Screening
2. Notice of ability to pay issue
3. Due process opportunity to be heard

# Recommendation: Screening

IV-D agencies should consider screening cases before referring for or initiating contempt proceedings:

Individual case review into the actual and present circumstances of the obligor.

Review should determine:

1. Actual evidence obligor had ability to pay and did not.
2. Obligor has present ability to purge.

# Screening

“Generally,

... [a] contempt action should only be initiated in these cases where there is evidence of the noncustodial parent’s ability to comply with the underlying child support order *and*

evidence that there is actual and present ability to pay the purge amount ordered.”

--emphasis added

## Recommendation: Notice

Notice should be given to the obligor that “ability to pay” is a critical issue.

1. Essential first criterion of due process: Notice.
2. LCSA may want to schedule screening interviews.
3. Provide information about legal resources.

# Recommendation: Opportunity to be heard

1. Judicial procedures should provide a real opportunity to be heard.
2. Ability to respond to questions about financial status.
3. Court should make express findings regarding ability to pay the purge amount.
  - Actual and present ability to pay based upon individual circumstances of the obligor.
  - Purge amounts should not be standardized or fixed but based upon actual, individual ability.

# Information Memorandum 12-01

Research shows:

Most child support arrears are owed by people with reported annual incomes below \$ 10,000.

No evidence exists that incarceration results in more reliable child support payments.

Rather:

1. Incarceration accumulates additional debt
2. Potentially reduces future earnings
3. Erodes family relationships
4. Negatively impacts family and community stability

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**CONTEMPT - PART II:**

## **PROCEDURE AND PRACTICE**



## CCP §1209.5

When a court of competent jurisdiction makes an order compelling a parent to furnish support . . . for his or her child, proof that the order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof that the parent did not comply with the order is prima facie evidence of a contempt of court.

Notice that ability to comply is not listed, as it is in §1209.

# An Old Remedy

The original civil contempt statute was enacted in 1872.

Discussion of the common-law doctrine “that every Court, at least of the superior kind, in which great confidence is placed, must be the sole judge in the last resort of contempts arising therein,” with regard to Habeas Corpus.  
*Ex parte Rowe* (1857) 7 Cal. 175, 178

Many of these cases are still good law – contempt has been a mature remedy for over a hundred years.

# Enforceable Orders

An order punishable by contempt must have the following:

- It must be an order;
- It must be certain; and
- It must be either written and filed or entered into the minutes.

*Ketscher v. Superior Court* (1970) 9 Cal.App.3d 601 [88 Cal.Rptr. 357]

# Why is this an issue?

Some out-of-state orders can be registered for enforcement, but not contempt.

- Administrative orders are not court orders, and can't be enforced by contempt.

# What's an uncertain order?

For contempt purposes, I have consistently rejected requests for enforcement of out-of-state orders that had cost-of-living adjustments not stated in dollar terms.

So, if the underlying order is \$500 plus 2% per year unless it's a leap year in which case it's 3%, I charge contempt at the earliest certain dollar-value rate -- \$500. If he's paying that, I doubt he's willfully non-compliant.

# How do we start?

Contempt in open court can be punished summarily under Code Civ. Proc., § 1211.

“When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers.

## CCP §1211 continued

“(b) In family law matters, filing of the Judicial Council form entitled ‘Order to Show Cause and Affidavit for Contempt (Family Law)’ shall constitute compliance with this section.”

- That’s FS-ENF-032 in CSE for payors, -033 for employers

# What IS sufficient?

“The first attack made upon the affidavit is that while it was alleged therein “that said defendant knew of and was familiar with the terms and provisions of said order”, it was not alleged that petitioner had been served with said order.



## *Ellery, continued*

“We are of the opinion that the allegations contained in the affidavit were sufficient as the disobedience of a lawful order of a court by one who has knowledge thereof constitutes contempt.” *In re Ellery* (1937) 22 Cal.App.2d 274, 275-76 [70 P.2d 690]

## What is INsufficient, then?

The seminal case on modern contempt is  
*Reliable Enterprises, Inc. v. Superior Court* (1984)  
158 Cal.App.3d 604, 609 [204 Cal.Rptr. 786, 788]

## So, what is INsufficient, then (continued)? (*Reliable* slide one)

“Before 1970, California law provided that “the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt; and if it does not, the court is wanting in jurisdiction, and the order of contempt is void and will be annulled on *certiorari*. [Citations.]

## Insufficiency, continued (*Reliable* slide two)

In such a case, it is immaterial what may be shown to the court upon the hearing, or specified and found by the court in its decree adjudging the accused guilty of contempt. The proceedings are void *ab initio*."<sup>5</sup> [cites omitted]

## Insufficiency, continued (*Reliable* slide three)

In 1970, the Legislature enacted Code of Civil Procedure section 1211.5.<sup>6</sup> (Stats.1970, ch. 1264, § 1, p. 2282.) The statute obviously represents the Legislature's desire that contempt proceedings be adjudicated and reviewed on the merits and that **contempt judgments not be set aside because of technical defects in an initiating affidavit.** [cites omitted]

## Insufficiency, continued (*Reliable* slide four)

Thus, for example, subdivision (a) of section 1211.5 provides that **if no objection is made to the sufficiency of an affidavit, subject \*618 matter jurisdiction “may be established by the facts found by the trial court to have been proved at [the] hearing...”** *Reliable Enterprises, Inc. v. Superior Court* (1984), *supra*.

# So, as long as I . . . .

As long as you allege

- A valid and certain judicial order
- Knowledge of that order
- And non-compliance . . .

...you'll have a sufficient affidavit, unless you:

- Prejudice the Defendant
- Try to add offenses not on the original affidavit
- File while the order is unenforceable, such as an order that is under appeal, or under a federal stay for bankruptcy.



# What could go wrong?

Things to watch out for before issuing:

- Is the citee in bankruptcy?
  - Contempt proceedings may be allowable without seeking relief from the automatic stay under 11 U.S.C. §362(b)(2) so long as such proceedings are directed to non estate property. Consult with your LCSA Attorney.
- Has the order been appealed?
- Am I alleging the actual order, not the referent to it in another order?

# Service?

Service of the underlying OSC in re: contempt can be problematic.

“...before a person can be found in contempt of court for failure to comply with an order directing payment of alimony, **he must be personally served** unless the court has ordered service upon his attorney of record after a showing that he is out of the state or is concealing himself to avoid service of process.” *Ex parte Meyer* (1933) 131 Cal.App. 41 [20 P.2d 732]

**Ok, we have good service of our OSC....**

## **§ 1217. Trial**

When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time if necessary.

## Don't expect the citee to answer questions

“Code Civ. Proc., § 2055 [now Evidence Code 776], relating to examination of the adverse party as a witness, applies to parties in a civil action and its provisions may not be invoked in favor of a person prosecuting a contempt proceeding as against the contemnor. The contemnor stands in a position similar to that of a defendant in a criminal action and may not be compelled to give testimony against himself.”  
*Oliver v. Superior Court of Los Angeles County* (1961) 197 Cal.App.2d 237 [17 Cal.Rptr. 474].

# Initial Hearing

You are entitled to make assumptions when you file –

- that the order is valid,
- that it was served properly,
- that the defendant really could pay the support.

The initial hearing is when you find out how wrong you can be.

# Defenses and Positive Contempt

There's a lot of concern, post *Turner v. Rogers*, about constitutional protections and due process. Here's how the Sixth District handled it in 1992:

"When an indigent person has been ordered to show cause why he or she should not be found in contempt and punished for alleged disobedience of an order to pay child support, and the potential punishment includes a possible jail sentence, must the county provide an attorney, at public expense, to represent the indigent citee? We hold that it must." *County of Santa Clara v. Superior Court* (1992) 2 Cal.App.4th 1686, 1688 [5 Cal.Rptr.2d 7, 8], *reh'g denied and opinion modified* (Feb. 19, 1992)

## The Sixth District went on to say this:

We observe that in the long run appointment of counsel to represent indigent citees is likely to be less expensive and more efficient than having these individuals represent themselves. The appointment of counsel serves the interests of the court as well as those of the litigants. These facts may furnish some comfort to the county, which ultimately bears the lion's share of the cost of the entire judicial process. All of us who have served on the family law bench recognize not only the **greater fairness** but also **the increased efficiency** which results when the citee has counsel. *County of Santa Clara v. Superior Court* (1992) 2 Cal.App.4th 1686, 1697 [5 Cal.Rptr.2d 7, 14], *reh'g denied and opinion modified* (Feb. 19, 1992)

# What are these benefits?

## Greater fairness:

- For the first time, the citee has an attorney who can review the order for possible modification.
- That attorney can now talk to a citee who might have special needs.
- The court might, due to a Sec. 1368 report, find out for the first time that a citee has mental issues that prevent him from paying support or complying with an order.



# Are there more benefits?

Increased efficiency:

- Defense Counsel can review the OSC and discuss with his client the biggest possible defenses including disability and incarceration. This results in 'right-sized' orders and Trainotti motions, and COAP applications.
- Defense Counsel can help weed out bad defenses, such as unemployment.
- Defense Counsel can help most contempts proceed by stipulation. Actual trials are infrequent.
- Contemnors that need it have someone helping them stay on track.

## You mentioned other defenses?

You cannot be found to be in willful non-compliance with an order that does not exist.

For example, if a VALID order is not in effect where stayed by appeal (or bankruptcy) *Clute v. Superior Court (1908)* 155 Cal. 15

## How could that happen?

An order could have lack of jurisdiction of subject matter or person, or be in excess of jurisdiction, and therefore not suitable for contempt. *Brady v. Superior Court* (1962) 2000 Cal.App.2d 69

The order could be void ab initio. Contempt adjudication can be attacked **collaterally**. *Elysium v. Superior Court* (1968) 266 Cal.App.2d 763

# What's after trial?

In Santa Clara, once someone is found guilty of contempt, they are placed on two years court probation.

The terms are simple:

1. Come to court; and
2. Pay your support; or
3. Show disability or work-search efforts.

# What does probation look like?

The most important case in probation is *Morrissey v. Brewer* (1972) 408 U.S. 471 [92 S.Ct. 2593, 33 L.Ed.2d 484], which found as follows:

“[T]he Supreme Court...held that minimal due process requirements for parole revocation include

- a preliminary inquiry in the nature of a preliminary hearing to determine probable cause,
- to be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest,
- and a revocation hearing with respect to which certain specified minimal due process requirements must be observed.” [Formatting added]

## Pretty low bar, then

Yes, a simple preponderance will do, since this is only regarding punishment for which the Contemnor has already been sentenced.

# *Vickers*

If he's 'absconding', you can revoke probation without him present, if, after he's picked up;

"[H]e is accorded a hearing which conforms to standards promulgated by the United States Supreme Court after being taken into custody." *People v. Vickers* (1972) 8 Cal.3d 451 [105 Cal.Rptr. 305, 503 P.2d 1313]

# So they go to jail?

There is always the potential.

CCP §1218 says:

- 120 hours jail or community service for each count on a first finding.
- 120 hours jail AND 120 hours community service for a second finding.
- 240 hours jail AND 240 hours community service for a third finding.



# What if he's still on probation for one contempt when I charge him again?

“The probation revocation hearing held in the instant case was not...a second criminal prosecution, nor was it intended to authorize criminal punishment. The proceeding took the form of a trial, with the presence of witnesses and the introduction of evidence, only because due process principles required such a hearing for petitioner's own protection. [Cites omitted]”

## *Coughlin, continued*

“Yet the sole consequence of revocation of probation is that offender must commence to serve a term for an offense of which NP previously was convicted.” *In re: Robert Michael Coughlin on Habeas Corpus* (1976)  
16 Cal.3d 52 at 61, 545 P.2d 249

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*Please be sure to complete the session evaluation.*

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