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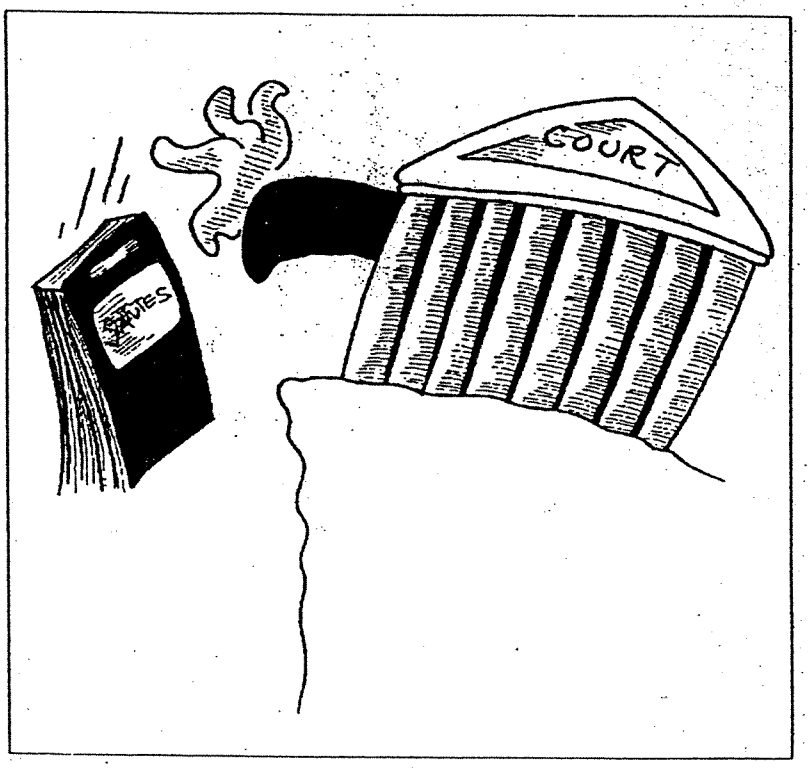
Family Bench Should Enforce Ex Parte Rules, Not Encourage Constant Abuse

By Fred Silberberg



It is time for the family law bench to enforce the rules concerning ex parte practice and not encourage its continued abuse. The failure of the bench to enforce these rules flies in the face of due process, wastes the limited resources of the court, exacerbates litigation and damages the public's perception of our family law court system.

In the family law arena, the items that a court can address on an ex parte basis are limited and specific. Ex parte motions can be granted only when an emergency or exigent circumstance exists concerning property, domestic abuse or custody of children. A court cannot, by law, address a matter on an ex parte basis solely as a matter of convenience. Yet courts do this on a daily basis.

The statutes addressing this area do not allow an ex parte proceeding to take place in order to appoint a child-custody evaluator; nor do they exist to grant a parent a specific vacation schedule. The law also does not permit a modification of a restraining order requiring that children remain in California unless there is an actual emergency concerning their health or welfare, on an ex parte motion. Laws also do not permit a court to make a support order without an opportunity for the other side to be given notice.

In addition, statutes do not allow a court to make discovery orders on an ex parte basis. They do not allow courts to set depositions or order documents to be turned over without a noticed motion. The law does not allow courts to enter these orders when the other side was given no opportunity to object. Yet, on a daily basis in our family law courts, these types of orders routinely are granted notwithstanding the lack of authority permitting these activities.

In the past, ex parte matters were heard only in an actual emergency. Most family law attorneys would not even consider bringing such an application without a grave emergency. Nowadays, caution has been thrown to the wind. Some family law attorneys give ex parte notice for most anything, and, in many of our courts in California, judges act on that notice without the legal authority to do so.

The abuse of the ex parte process is most egregious when it is granted solely as a matter of convenience. An attorney will be available on a specific day so that is the day that he wants the matter heard, never mind that opposing counsel is not available.

This practice can have grave consequences. For example, allowing an ex-parte hearing to entertain a request to modify a restraining order which prohibits removal of a child from the state gives undue advantage to the party bringing the motion. The moving party can spend days preparing and then give notice by 10 a.m. the day before, giving the opposing party little or no time to prepare. As a result, the opposing party often loses because of inadequate time to prepare his or her valid objection.

Judges who allow these matters to be heard on this basis toss due process out the window. These courtrooms would rather deal with the issue in a brief chambers discussion than go through a long drawn-out hearing. These judges, however, fail to see the short- and long-term effects of their actions.

Ex parte applications of convenience, rather than necessity, are detrimental to our judicial process in other ways. These applications create delays in the efficient administration of justice when parties who are in court on a noticed motion or an order to show cause must wait while the supposed "emergency" is heard first.

As a result, a matter that has been scheduled for weeks might go over to another day, resulting in unnecessary cost and expense. Court administrative personnel are taken away from processing documents and minute orders that should have been handled on that particular day because they are handling ex parte papers that should not have been filed in that manner.

These events contribute to the backlog in the processing of cases that exists just by virtue of the number of filings in family law courts. As time goes on, the problem will snowball.

Judges who allow the ex parte of convenience, rather than necessity, encourage lawyers to make more such applications. While public policy supposedly discourages frivolous litigation, allowing ex parte applications of convenience does the opposite.

In some counties, it is to the point where any party who feels aggrieved or inconvenienced may make an ex parte application. In many cases, the court file is in its second volume by the time the first order to show cause is heard because of the high number of ex parte applications.

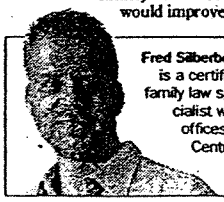
Ex parte applications of convenience also create hostility among counsel. Pity the attorney who must abort a planned three-day weekend with a spouse because opposing counsel insists on going in on Friday morning because that is convenient to his calendar.

Allowing ex parte applications of convenience also gives the party with the money an unfair advantage in the litigation. It is expensive to go to court, and the party with fewer resources must attend or lose. This is even more apparent when the ex parte application precedes any hearing on financial issues or delays such a hearing.

Finally, entertaining these applications when they are not really necessary results in a negative public perception of the courts in general and the individual judges in particular. It sends a message that courts do not enforce rules and statutes and that sanctions mean nothing. It shows that judges will do what is convenient for certain attorneys and for themselves, not necessarily what is just.

This is not how our system is supposed to operate. The key to taking control back is for courts to follow the rules.

If courts would deny ex parte applications of convenience and use their sanction power to put a stop to this abuse, cases would be processed more efficiently, litigants would be given the opportunity to present their cases properly before the court, counsel would be forced to be more cooperative and the public's perception of the family law court would improve.



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