CONTEMPT PROBATION – PART 2[1]
WHAT DO I DO NOW THAT THE CONTEMNOR IS [STILL] NOT COMPLYING?

INTRODUCTION

Congratulations!!! You successfully navigated the quagmire of obtaining a contempt finding and succeeded in the entry of enforceable probation orders. Things were going fine. You thought the Contemnor[2] had seen the error of his/her ways and was on track with obeying the orders you worked hard to obtain. You now know that your view of reality was not as accurate as you hoped – the Contemnor, now the Probationer, has gone back to his/her evil ways. Now what do you do?

Family Code §290 gives the court the power to make orders that in its discretion it believes are necessary for the enforcement of its judgments or orders. Contempt proceedings are treated as if they are the equivalent of a criminal misdemeanor. Penal Code §1203.3 provides the rules for probation revocations. Criminal law cases provide further authority for issues related to probation revocations. The United States Supreme Court in Hicks v. Feiock (1988) 485 U.S. 624 makes it clear that no criminal penalties can ever be imposed on a person who has been denied criminal protections. The better practice in family court contempt probation violation proceedings is to proceed at all stages by providing the probationer with the same Constitutional protections as a misdemeanor defendant.

A violation can occur by the Probationer failing to follow any of the terms of probation or from committing further court order violations whether or not those specific orders were mentioned as a term of probation (as long as one of the terms of probation was to obey all court orders). If the probation terms do not include the specific condition of obeying all court orders, then violations of non-included court orders cannot form a basis for a finding of a violation of probation, even though you can succeed on a new contempt finding.

If the probation violation is based on a new violation of a court order, then you have the option of filing both a probation revocation request and a new contempt motion. If this is the case, you must file two separate motions. A probation revocation motion is filed with the Order to Show Cause (FL-300) and Application for Order and Supporting Declaration (FL-310) forms[3]. The new contempt motion is filed on the Order to Show Cause and Affidavit for Contempt (FL-410) ("OSC") along with the appropriate Affidavit form(s) (FL-411 and/or FL-412).

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[1] The first part of this article covered the issue of contempt probation once a Court found the Citee (now Contemnor) in violation of court orders. Part 2 covers probation violation issues.

[2] Contemnor is the term used when the person is found in contempt of a court order. This article will refer to this person as a Probationer as s/he is now on probation.

[3] If the proposed Judicial Council Rule revisions related to Order to Show Cause and Notice of Motion forms stemming from the Elkins Family Law Task Force are adopted, there will these forms will be replaced with an Application for Order and Supporting Declaration.

I have broken down the probation revocation process into 11 steps for purposes of this article. This should help point out the important areas that must be addressed to obtain a probation revocation or to successfully defend against a probation revocation. I have first given the steps together to be used as a check list. I then will go through each step with a brief analysis.

11 STEPS TO FOLLOW

Step 1: Determine if there has been a violation of any of the probation terms and that probation has not yet expired.
Step 2: Determine if the violation is able to be prosecuted as a new contempt of court.
Step 3: Determine if you have admissible evidence to support your burden of proof for both the probation violation and the new contempt motion.
Step 4: Determine if you will file a probation revocation motion, a contempt of court motion, or both.
Step 5: Prepare, file and personally serve the motion(s). Include an ex parte request that probation is to be revoked pending further hearing and/or court order.
Step 6: At the first hearing, insure that the Probationer is advised of his/her Constitutional rights.
Step 7: Determine if the Probationer wants to admit the violation or have a probation revocation hearing.
Step 8: Determine if the Court wishes to include the probation revocation hearing with the new contempt hearing or wishes to have separate hearings.
Step 9: Conduct the hearing
Step 10: Sentencing if probation revoked
Step 11: Determine if writ review is appropriate. If so, timely file writ of habeas corpus.

Step 1: Determine if there has been a violation of any of the probation terms and that probation has not yet expired.

Penal Code §1203.2(a) sets forth the grounds for revoking probation in criminal court convictions. The ones that are most relevant for our purposes are:

- A violation of a condition of probation
- Subsequent commission of criminal offenses (assuming that one of the terms of probation is to obey all laws); and in our cases subsequent violations of court orders (assuming one of the terms of probation is to obey all court orders)
- Willful failure to pay a fine or restitution, despite the ability to pay, or refusal to work after having been given the opportunity to work as an alternative to paying restitution. However, there can be no revocation for a failure to pay that results solely from an inability to pay

Probation must be revoked before the end of the probation term otherwise there can be no revocation and punishment for violating the terms of probation[4]. The Court can retain jurisdiction

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[4] This is a specific order that must be made. It is insufficient to revoke probation by the issuance of an order for a probation revocation hearing and/or the issuance of a bench warrant.

by entering a preliminary revocation order pending the probation revocation hearing. This acts to toll the expiration of the probation term until a revocation hearing can be held. The Court will then have sufficient time to hold an appropriate hearing and will maintain jurisdiction to sentence the probationer for a violation even after the original probation expiration date has passed. The tolling is only effective if there is a finding of a probation violation. The remaining probation time then recommences on the date of the reimposition of probation, which should be the date of sentencing[5]. If there is no finding of a probation violation, then the tolling is deemed to never have occurred and the original termination date remains in effect.

Step 2: Determine if the violation is able to be prosecuted as a new contempt of court.

This step relates to actions that are violations of court orders. It is the same analysis that is made when you are deciding whether or not you have the ability to prove: (1) a valid court order in effect at the time of the alleged violation; (2) knowledge of the order at the time of the alleged violation; (3) failure to comply with the court order; and (4) ability to comply [for non-child support orders]. As a reminder, the knowledge of a valid court order means that the Citee had provable knowledge of a valid written order prior to the date of the alleged violation.

Step 3: Determine if you have admissible evidence to support your burden of proof for both the probation violation and the new contempt motion.

Determining if you have admissible evidence is no different than making that analysis and determination for any other hearing or trial. Because this is a contempt matter and/or probation revocation matter you cannot invoke Evidence Code §776 to call the Probationer as a witness in your case due to the Probationer's Constitutional rights against self-incrimination. When the only witness (other than the Probationer) to the alleged violation is a child of the parties, you and your client should think long and hard about whether to call the child as a witness. It is definitely not in the child's best interest to testify for one parent against the other parent. The typical situation results in the child asking the moving parent why s/he is trying to put “daddy/mommy” in jail[6].

In contempt trials you can only use statutorily admissible hearsay evidence. In probation revocation hearings you can use hearsay as long as there is indicia that it is reliable. Because of this difference in admissible evidence, you must be very careful at a joint (contempt and probation revocation) hearing to make the proper objections and require that the Court make specific findings if there is no acquittal. If the Court uses the hearsay evidence that is only admissible for the probation revocation hearing to find the Citee/Probationer guilty of contempt, there may be an invalid contempt finding even if there is a valid probation revocation finding. This is just one simple issue that must be looked into when deciding what evidence you have and what you are going to do in Step 4 of your analysis.

(See People v. Mosley (1988) 198 Cal.App.3d 1167; People v. Broadway (1981) 123 Cal.App.3d Supp 19; People v. Burton (2009) 177 Cal.App.4th 194; People v. White (1982) 133 Cal.App.3d 677.)

[5] See People v. DePaul (1982) 137 Cal.App.3d 409.

[6] If the case is so contentious that a contempt is necessary, there is an almost certainty that the “violating” parent is telling the child that the other parent is trying to put him/her in jail. Why not try to guilt the other parent into backing off by putting the child in the middle?

Step 4: Determine if you will file a probation revocation motion, a contempt of court motion, or both.

In criminal cases there is no statutory time limit for holding a probation revocation hearing. However the United States Supreme Court in Morrissey v. Brewer (1972) 408 U.S. 471, 485 held that revocation hearings must be held as "promptly as convenient after arrest while information is fresh and sources are available." What this means for us is that you should not wait too long to file your probation revocation hearing otherwise the Probationer may lose the ability to provide a defense due to the loss of evidence or witnesses, and the Court will lose the ability to revoke probation.

In People v. Buford (1974) 42 Cal.App.3d 975, a 2-½ month delay in filing the probation revocation notice was held to be unreasonable. A good defense attorney will be able to argue that a lengthy delay has resulted in the fading memory of witnesses, the Probationer and/or the destruction of evidence which makes it harder for the Probationer to defend against the allegations resulting in prejudice to the Probationer of such a degree that it would be an abuse of discretion by the Court to revoke probation. Prejudice can be shown by the inability to obtain concurrent sentencing with a new contempt motion. On the other hand, the party bringing the motion can make the argument that there has been no prejudice to the Probationer's ability to defend him/herself.

Step 5: Prepare, file and personally serve the motion(s). Include an ex parte request that probation is to be revoked pending further hearing and/or court order.

The Court can issue a preliminary revocation of probation if the Judge finds there is probable cause that a probation violation has occurred. If probation is not revoked, then the probation time continues to run and if it expires prior to a hearing being held, the Court has lost ***ALL*** jurisdiction over the Probationer on the underlying probation. This means no punishment. Once the probation is revoked, the remaining probation period is stayed. You should make sure you understand the standards in your County for obtaining no-notice ex parte orders. If you believe that there will be irreparable harm (i.e., the probationer will avoid service, etc.) then you should file the request without notice. However, filing the request with notice of the ex parte probation revocation can be an effective tool as a "wake up" call to the Probationer to purge the violations and move back into compliance. This needs to be a case-by-case decision.

The Probationer must be given written notice – oral statements that a probation revocation is being requested is insufficient. The notice must include the alleged violation(s) of probation, disclosure of any evidence against the Citee, and an opportunity to respond to the charges[7]. The Probationer also has the right to sufficient time to investigate and prepare a defense against the specific allegations. The revocation can only be based upon the facts set forth in the written probation revocation notice. This is different than a contempt trial. Under Code of Civil Procedure 1211, the contempt citation may be amended at any time up to submission of the matter to the Court, as long as the Citee's Due Process Rights are not violated by doing so.

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0. See People v. Self (1991) 233 Cal.App.3d 414, 419.

Step 6: At the first hearing, insure that the Probationer is advised of his/her Constitutional rights.

The majority of the Constitutional protections which are in place for an initial contempt motion are also to be extended to a Probationer who is before the Court on a probation revocation hearing.

If probation was not revoked in the ex parte motion, a request for revocation pending hearing can be made at the first hearing, assuming that the original probation term has not expired. If it was revoked by an ex parte order, the request to have it remain revoked pending hearing should be made. If you want the Probationer to be remanded into custody on the revocation pending hearing, then it is imperative that s/he be put on notice and that s/he be advised of the right to counsel and given the opportunity to obtain counsel prior to the remand.

The Probationer has the following rights at the probation revocation hearing:

1. Written notice of the alleged probation violation(s);
2. Disclosure of the evidence against him/her;
3. The opportunity to be heard in person and to present witnesses and documentary evidence;
4. The right to confront and cross-examine adverse witnesses;
5. A neutral and detached hearing body; (In our case, the Judge.)
6. A written statement by the Judge about the evidence relied on and the reasons for the revocation, if the court has not stated this on the record;
7. A right to an attorney, either privately retained or court-appointed if the Probationer cannot afford an attorney
8. Rights against self-incrimination, including the right not to provide discovery.

Step 7: Determine if the Probationer wants to admit the violation or have a probation revocation hearing.

The Probationer has the absolute right to admit the violation of the probation terms or have a hearing to determine if there has been a violation. The Probationer is allowed to do so, even against the advice of his/her attorney. In order for the Probationer to admit the violation, the Court must make sure that s/he has been advised of his/her rights and that the waiver is done knowingly and intelligently.

A Probationer may want to admit to the violation if the admission results in the Probationer avoiding the Judge's "attitude" test[8] and returning to probation versus an evidentiary hearing where a finding of a probation violation results in an immediate remand into custody.

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[8] The attitude test can be anything that causes the Judge to not be as lenient as the Probationer would like in either the determination as to whether or not there has been a violation sufficient to warrant probation revocation and/or sentencing. In addition to assessing the Probationer's credibility as a witness, you need to know your specific Judge's peculiarities and level of tolerance in making the decision to take a deal or go forward with the probation revocation hearing.

Step 8: Determine if the Court wishes to include the probation revocation hearing with the new contempt hearing or wishes to have separate hearings.

This is a very fact specific analysis. It can depend on which side of the case you are on – prosecuting or defending; what evidence is admissible; how much of the evidence is admissible for both hearings versus only one of the hearings; the rights of the Probationer; judicial economy; etc.

The Court must insure that the Probationer's constitutional and due process rights are maintained in determining whether there will be on hearing or two separate hearings. The party bringing the contempt/probation revocation hearing does not have the same constitutional or due process rights since s/he is not technically a party to these two proceedings.[9]

Step 9: Conduct the hearing

Once a Judge issues an order in the probation revocation motion, that Judge has continuing, exclusive jurisdiction until resolution[10]. However, the Probationer may waive this right to allow another Judge to take over the case. If the Probationer does not waive this right, the Judge issuing the first order (i.e., a temporary probation revocation) must keep the case or the case must be dismissed. There is no requirement that the Judge who entered the underlying probation order be the Judge hearing the probation revocation motion.

The standard of proof for a probation revocation is proof by a preponderance of the evidence. (See People v. Rodriguez (1990) 51 Cal.3d 437.) The violation also must be found to have been willful. In criminal cases, an attorney representing a Probationer at a probation revocation hearing is held to the same standards as if representing him/her at a criminal trial.

Hearsay is usually not admissible, including prior testimony, unless good cause is shown as to why it should be admitted in lieu of live testimony. Good cause must be done on a case-by-case basis. It is still important for the Judge to observe the demeanor of witnesses and for the Probationer to have the opportunity to cross-examine the witnesses against him/her.

If one of the grounds for the probation revocation is a new contempt of court charge to be heard at a different time, the dismissal of the contempt or an acquittal on the contempt, does not bar the probation revocation hearing on the same facts. In essence the Court is performing a de novo hearing on the facts to determine if there are grounds for a probation revocation. A contempt finding requires proof beyond a reasonable doubt, whereas a probation revocation hearing only requires proof by a preponderance of the evidence. An example would be a person who is charged with a capital murder has been found not guilty, but at the subsequent civil suit by the heirs of the deceased, is found liable for the death with a civil judgment being entered against him/her.

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[9] The aggrieved individual (the one who presented the charging affidavit [declaration]) is not a party in the contempt proceeding. See California Family Law Practice and Procedure, Ch. 140, §140.86[2][b] (Matthew Bender).

[10] See People v. Ellison (2003) 111 Cal.App.4th 1360; Williams v. Superior Court (1939) 14 Cal.2d 656.

The revocation cannot be based upon prior probation revocation allegations that have been dismissed, unless there was no evidence presented at the first hearing or the allegations were withdrawn before a hearing could be held. If there was a hearing, then the results should be found to be res judicata or collateral estoppel such that there can be no second hearing on the same evidence. This is in essence double jeopardy.

Step 10: Sentencing if probation revoked

The first thing to determine is whether or not the underlying sentence was entered as an "imposition of sentence suspended" or "execution of sentence suspended". As a reminder from Part 1 of this article, "imposition of sentence suspended" allows the Judge to determine how much time, if any, should be imposed for the probation violation and "execution of sentence suspended" leaves the Judge no discretion but to impose the suspended sentence.

Unlike an initial finding of contempt, there is no statutory requirement for a delay between the probation revocation finding and the sentencing. For probation revocation hearings, the Probationer should be prepared to immediately go into custody if s/he is found to have violated the terms of probation. This is another good reason for the Probationer to consider admitting the violation with an agreed upon sentence, that also includes a small delay to allow the Probationer to get his/her affairs in order before serving the jail time.

Assuming that the Judge has the discretion to determine the sentence to be imposed on a probation revocation hearing, the Judge can do one of the following:

1. Revoke probation and impose the underlying sentence, or any remaining sentence if there was a previous probation revocation.
2. Reinstate probation on the same terms and conditions without imposing any further punishment. If probation was suspended pending the hearing, then the probation expiration date is extended by the number of days probation was suspended.
3. Reinstate probation and impose new probation terms and conditions without imposing any of the suspended sentence. Again, the probation expiration date would be extended.
4. Reinstate probation, either with or without new terms of probation, and impose some amount of the underlying sentence. The probation expiration date is also extended by the number of days it was stayed pending hearing.

If the Court revokes probation, the Probationer must be given credit for all time served on the underlying probation sentence and any time served pending the revocation hearing and sentence. For example, Probationer is sentenced to 30 days in jail, imposition of sentence suspended with the requirement s/he serve 5 days with 25 days remaining suspended. The Court finds that Probationer has violated the terms of probation and the entire sentence is imposed. The Probationer must be given credit for the first 5 days served leaving 25 days for the probation revocation sentence.

The Court must make written findings of the reasons for the violation and the evidence relied on. This can be done either as a written order after hearing or on the record. There is no

requirement for a formal statement of decision[11]. However, the better practice is to do a Findings and Order After Hearing containing all of the findings, evidence relied on, and sentence imposed.

Step 11: Determine if writ review is appropriate. If so, timely file writ of habeas corpus.

This analysis is beyond the scope of this article. This issue should be discussed with appellate counsel as soon as possible. If you believe that there will be a problem and your client will be found in violation improperly, have appellate counsel on board early and/or at the probation revocation hearing.

A Probationer also has the right to file a motion to modify the terms and/or length of probation. This must also be done by a written motion with notice to the other party (and the Department of Child Support Services if they are providing services and it is a support-related contempt probation).

CONCLUSION

Like the initial Contempt hearing and sentencing, this area of the law is a cross-over between family and criminal law. In order to be effective in obtaining a valid probation revocation, you really need to have a good understanding of the Constitutional and criminal law rules related to probation revocations. If this area is unfamiliar, it is wise to consult with an attorney who has experience in this area, or associate the attorney in to represent your client on the contempt portion of the case.

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[11] See Morrissey v. Brewer (1972) 408 U.S. 471; People v. Vickers (1972) 8 Cal.3d 451.