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Availability of the Ex Parte Motion in Louisiana

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AVAILABILITY OF THE EX PARTE MOTION IN LOUISIANA

In Louisiana, motions may be either oral or written, depending on whether they are made in open court.[1] Since they are considered a form of pleading when written they must conform to certain requirements.[2] The general provisions[3] of the Code of Civil Procedure do not specify which motions can be granted ex parte and which can be granted only after a contradictory hearing.[4] Article 963 merely provides that an order "to which the mover is clearly entitled without supporting proof" may be granted ex parte. Although application of this provision must raise questions in the minds of those dealing with it, little litigation has resulted. All but one of the cases generated over the issue of what can and cannot be done by an ex parte order have been in the area of discovery. This Comment will discuss the available jurisprudence and other materials which may be helpful in providing some guidance in the application of the Code's general test. To insure that the practical aspects of this procedural problem would not be obscured by purely theoretical concepts, the writer has made a serious effort to understand the practical application by discussing the problem with judges and practitioners.

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1. LA. CODE CIV. P. art. 961 (1960).

2. *Id.* art. 962. Under the federal rules motions are not considered as a form of pleading. *Id.* at Preliminary Statement to bk. 2, tit. 1, ch. 4.

3. See Appendix for specific provisions for one method or the other.

4. LA. CODE CIV. P. art. 963, comment (b) (1960): "Contradictory motions are of two types. Usually, they are in the form of a 'rule to show cause'. . . . Less frequently, the contradictory motion is in the form of that used in federal practice. . . . Under this article, either form . . . may be used, at the option of the mover."

McMahon, *Summary Procedure: A Comparative Study*, 31 TUL. L. REV. 573, 586 n.50 (1957): "The Louisiana 'rule to show cause' is a hybrid, commencing with a written motion by a party through counsel suggesting the need or desirability of certain specified relief, and ending with a court order requiring the adverse party to show cause on a date and hour designated why the suggested relief should not be granted. . . . It is reasonable to believe . . . that the Louisiana rule is an offspring of the common law rule *nisi* with, except as noted hereinafter, this difference: In Louisiana practice, the plaintiff in rule bears the burden of proving the facts suggested in the rule and of satisfying the court of his right to the relief suggested. The only Louisiana rules in which, as in the common law rule *nisi*, the defendant in rule bears the burden of proof are those to test the surety on a judicial bond, and to traverse a party's right to prosecute or defend the action *in forma pauperis*. The fact that in these latter the pertinent facts are always peculiarly within the knowledge of the defendant probably accounts for this difference." *Cf.*, generally, H. MCMAHON, LOUISIANA PRACTICE AND PROCEDURE ch. 5, § 5, at 524 (1939).

LOUISIANA JURISPRUDENCE

Raia v. WWL-TV

The decision which first explored the problem was *Raia v. WWL-TV*.[5] In this defamation action defendants obtained an ex parte discovery order under article 1492 of the Code of Civil Procedure.[6] Plaintiff's motion to quash the order with a rule to show cause was overruled after a hearing. In the Supreme Court plaintiff attacked both the original order and the overruling of the motion to quash. He objected to the original order on the grounds that the "good cause" requirement of article 1492 was not met and that such an order cannot be issued without a contradictory hearing. Defendants urged that the circumstances of the case and the nature of the documents sought supplied "good cause," and that there is no legal requirement for a contradictory hearing. Alternatively, defendants argued that "any irregularity in the original order was cured by the hearing on the motion to quash that order."[7] One of the apparent difficulties encountered by the Supreme Court was the absence of a transcript from the trial court. The plaintiff alleged that no evidence was taken at the contradictory hearing on the motion to quash. The court answered by invoking the "well recognized presumption that the judge a quo had before him sufficient evidence and reasons to support the rulings complained of."[8]

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5. 247 La. 1095, 176 So.2d 390 (1965).

6. LA. CODE CIV. P. art. 1492 (1960): "Upon motion of any party showing good cause therefor, and subject to the provisions of Article 1452, the court in which an action is pending or in which the judgment was originally rendered may:

"(1) Order any party to produce and permit the inspection and copying or photographing by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Article 1436 and which are in his possession, custody, or control. . . ."

7. 247 La. 1095, 1099, 176 So.2d 390, 391 (1965).

8. *Id.*; *cf.* Clark v. Richardson, 157 So.2d 325 (La. App. 3d Cir. 1963), for a collection of authorities.

This type situation will be encountered later. See text at note 33 *infra*. It should operate as a caveat to the practitioner when there is any chance that he may wish to appeal the ruling of the trial court. The problem raised is mentioned by Justice Summers in his dissenting opinion to Dugas v. Continental Cas. Co., 249 La. 843, 848, 191 So.2d 642, 644 (1966): "And how is a reviewing court to measure the exercise of a trial court's discretion where that discretion is not based upon any record evidence? An order not supported by the record, in effect, denies the aggrieved party the right of review on appeal, for it cannot be determined whether the trial court has properly exercised its discretion without the evidence upon which the evidence is founded."

The court in Mangrum v. Powell, 181 So.2d 400 (La. App. 2d Cir. 1965),

The court then adroitly avoided the issue of the need for an initial contradictory hearing.

> "Having found that there was a contradictory hearing on the motion to quash anent the validity of the initial discovery order which resulted in judgment maintaining it in full force and effect, it becomes unnecessary for us to determine whether or not such order was properly obtained in the first instance (on this question we do not now express an opinion."[9]

Continuing, the court said that this was "in keeping with our decision in refusing an application for supervisory writs in *Ackermann v. Columbia Casualty Company et al.*"[10] In *Ackermann* the same procedure—"an ex parte discovery order having been maintained by a judgment overruling a motion to quash following a contradictory hearing on such motion"—had been followed.[11]

Justice Summers, dissenting, discussed the need for a showing of "good cause" and for an adversary proceeding in the initial stage. As to the former, he said that "the meager allegation in the motion which formed the basis of the contested ex parte order is fatal to its validity"[12] and that the plaintiff was

distinguishes the *Raia* case on this point. There, the trial court directed by ex parte order the production of certain medical reports. Plaintiff sought to quash the order in a contradictory hearing, but was overruled. Writs were granted. No evidence was adduced at the hearing and the court minutes merely note: "Motion to set aside the Order of Production of Documents argued and motion overruled." *Id.* at 401. In distinguishing the *Raia* case and setting aside the production order, the court said: "We observe, however, that the case cited did not invoke application of the limitations imposed upon LSA-C.C.P. Art. 1492 by the provisions of Article 1452. It was not contended in Raia that the data sought therein through discovery means was affected by the limitations of Article 1452." *Id.* at 402.

9. 247 La. 1095, 1100, 176 So.2d 390, 392 (1965).

10. 247 La. 354, 170 So.2d 868 (1965).

11. 247 La. 1095, 1101, 176 So.2d 390, 392 (1965).

12. Id. at 1103, 176 So.2d at 393: "This good cause requirement is not a mere formality, but is a plainly expressed limitation of that article. It is not met by mere conclusory allegations (or no allegations as in this case) of the pleadings—nor by mere relevance to the case—but requires an affirmative showing by the movant that each document, as to which examination is sought, is really and genuinely needed and the purpose for which it is sought is legitimate, or that good cause exists otherwise for ordering each particular examination." *Id.* at 1105, 176 So.2d at 393. See Geolograph Serv. Corp. v. Southern Pacific Co., 172 So.2d 128 (La. App. 1st Cir. 1965), for additional interpretation of the good cause requirement, with particular emphasis on federal practice and interpretation. The court quashed an ex parte discovery order because the good cause requirement, with particular emphasis on federal practice and interpretation. The court quashed an ex parte discovery because the good cause requirement had not been met.

entitled to have it set aside. As to the need for a contradictory hearing, he asserted:

> "Furthermore, an adversary proceeding is clearly required by the code when it says: 'If the order applied for by written motion is one to which the mover is not clearly entitled, or which requires supporting proof, the motion shall be served on and tried contradictorily with the adverse party.' La. Code Civ. P. art. 963. I submit that *in no instance, without hearing the adverse party, is a mover 'clearly' entitled to copy and examine documents of a litigant, his counsel or witness.*" (Emphasis added.)[13]

Against this background the remaining discovery cases can be considered chronologically.

The Source Provisions

Lindsey v. Escude[14] involved an ex parte order to report for a physical examination issued pursuant to article 1493.[15] The court concluded that such an order is improper without the contradictory hearing contemplated by the article.[16] In his opinion, Judge Tate discussed the specific language of the article, its source provision and historical background in the

13. 247 La. 1095, 1106, 176 So.2d 390, 394 (1965).

14. 179 So.2d 505 (La. App. 3d Cir. 1965).

15. LA. CODE CIV. P. art. 1493 (1960): "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending or in which the judgment was originally rendered may order him to submit to a physical or mental examination by a physician, except as otherwise provided by law. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

16. Abshire v. Hartford Acc. & Indem. Co., 179 So.2d 508 (La. App. 3d Cir. 1965), is a companion case, an ex parte order requiring one to report for a medical examination. The one distinguishing feature on which the decision rested was that *this* order was issued pursuant to R.S. 23:1121 of the Louisiana Workmen's Compensation Act. After mentioning the *Lindsey* case and its result, the court says: "However, Article 1493 also provides that the court may issue an order for medical examination under its terms *'except as otherwise provided by law.'* This latter proviso was specifically intended to leave undisturbed the provisions of the Louisiana Workmen's Compensation Act. . . . As we shall show, this excepting proviso was nevertheless not intended to eliminate the requirement of prior notice and an opportunity to oppose the examination before the order is issued." *Id.* at 510. So the two cases are identical in result in that the orders were overruled, but the *Abshire* case involved a different source article. Judge Hood dissented, believing that the clause "except as otherwise provided by law" in article 1493 was included to cover the situation at hand. And since R.S. 23:1123 contains no requirement for a contradictory hearing, an ex parte order is sufficient.

Federal Rules of Civil Procedure, a comparison of the language of articles 1492 and 1493, and the general policy bases for the interpretation rendered. An analysis of Judge Tate's approach reveals an emphasis on the phrase "upon notice to the party to be examined."

> "[I]t cannot be interpreted to mean that such notice need not be given until *after* the order is issued. Obviously, if a statute did purport to authorize an ex parte order, such an order could never be effective without notification of it to the party ordered by it to submit to medical examination. There would thus be no need for the code article to specify that an order for medical examination could be issued only 'upon notice' if an ex parte order with notice only *after* it were contemplated."[17]

Because of the relative abundance of cases and treatises interpreting the Federal Rules, Louisiana courts are relying on them as a persuasive guide to the meaning of our code articles whenever possible. Article 1493 tracks the language of Federal Rule 35(a)[18] under which a contradictory motion with notice is required before an order is issued.[19]

Additional support for the position of the court is provided by a comparison of the language of articles 1492[20] and 1493. Article 1492 follows Federal Rule 34[21] in providing for production of documents and related items but contains a deletion which was deemed most important by the court—the phrase "upon notice" is *not* found in our article 1492 as it is in article 1493.

> "We regard this deliberate change from the federal practice . . . and the apparent deliberate retention of the federal wording and practice as to LSA-C.C.P. Art. 1493 relating to orders for medical examinations, as a plain indication that the Law Institute and the Louisiana legislature intended to preserve the federal practice that orders for medical

17. 179 So.2d 505, 506 (La. App. 3d Cir. 1965).

18. 28 U.S.C.A. § 35(a) (1952).

19. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 822, at 480 (1961).

20. See note 6 *supra*.

21. 28 U.S.C.A. § 34 (1952); 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 801, at 464 (1961): "An application for discovery and inspection is made on motion. Notice of motion is required, as the adverse party is entitled to be heard on the question of whether the application should be granted, and, if so, the extent and manner of discovery."

examinations be issued only after notice and an opportunity to be heard in opposition to the order."[22]

In terms of general policy, the court mentioned that good cause must be shown and that the "party to be examined should be able to have the examination made at a time and place without undue inconvenience to himself, as well as to oppose examinations as unnecessary, painful, or hazardous."[23]

Finally, the concept of sanctity of the person was cited. The case of *Sibbach v. Wilson & Co.*[24] was mentioned as indicating the hold which this principle has upon the feelings of our courts. In that case the source provision of article 1493, Federal Rule 35(a), was upheld by a five to four vote. Troubling the dissenters was an apparent infringement upon the "inviolability of the person" and the "liberties of the subject."[25] The more recent case of *Schlagenhauf v. Holder*,[26] in which the United States Supreme Court emphasizes the need for a strong showing of good cause when this discovery device is used, demonstrates that these ideals have not been abandoned.

The Role of the Good Cause Requirement

In *American Mark Distributing Corp. v. Louisville & Nashville R.R.*[27] the court was faced with determining whether the "good cause" requirement of article 1492 had been met.[28] Some of the language of the decision is pertinent to the present inquiry. The lower court refused to set aside an order for the production of documents; as to the need for additional proof in general, the appellate court said:

> "We think in certain instances *good cause* for the production of a document might be deduced from the motion itself, if discovery, which is procedural and remedial, is to be construed liberally, as is proper."[29]

After reviewing the contents of one of the documents, the court concluded that "because of its very nature, it was not necessary

22. 179 So.2d 505, 507 (La. App. 3d Cir. 1965).
23. *Id.*
24. 312 U.S. 1 (1941).
25. *Id.* at 17.
26. 379 U.S. 104 (1964).
27. 180 So.2d 869 (La. App. 4th Cir. 1965).
28. *Cf.* Geolograph Serv. Corp. v. Southern Pacific Co., 172 So.2d 128 (La. App. 1st Cir. 1965), for interpretation of good causes, with particular emphasis on federal authorities.
29. 180 So.2d 869, 871 (La. App. 4th Cir. 1965).

to show good cause."[30] The order for production of the other documents was set aside since there was neither a showing of good cause nor of prejudice because of non-production. The court concluded that the trial judge "was without any authority insofar as said items are concerned to grant the ex parte order of production which was secured by simple motion. . . . No evidence was taken on the presentation of the motion or on the trial of the motion to recall the order of production. See Raia v. WWL-TV."[31]

It is not over-emphasizing the words "insofar as said items are concerned" to conclude that this court does not believe a contradictory hearing is required in all instances. The exact significance of the reference to the *Raia* case is not clear. Not having read *Raia*, one would infer from the reference that it would be authority for the proposition that an order for the production of documents cannot be made when no record of evidence was taken on the original order or the motion to quash. As we have seen,[32] this is not true. It is more likely that *Raia* was mentioned merely to indicate an awareness of that decision and the implications it has raised.

The Supreme Court in *Dugas v. Continental Cas. Co.*[33] denied the writs of a party ordered to produce certain X-rays over Justice Summers' dissent.[34] In contrast to *Raia* and other cases examined, the order was not made ex parte. Upon motion for production, the trial court ordered the opposing party to show cause why the X-rays should not be produced. Several objections were made to the motion for production.[35] At the hearing the trial judge found that the mere allegation in the motion would not satisfy the good cause requirement, but indicated that an oral statement of defense counsel supplied the deficiency. It was upon this point that Justice Summers dissented,[36] placing

30. *Id.*
31. *Id.* at 872.
32. See note 9 *supra.*
33. 249 La. 763, 191 So.2d 141 (1966).
34. *Id.* at 843, 191 So.2d at 642.
35. There were three objections: that the X-rays were privileged, that no good cause had been shown, and that although article 1492 authorizes the court to order production and permit inspection and copying of evidence, the court cannot require that possession of the evidence be surrendered.
36. 249 La. 843, 846, 191 So.2d 642, 643 (1966): "According to the application before us and the trial judge's written reasons, no evidence was taken at the hearing, and the order issued merely upon the conclusory allegation of defendant's counsel contained in the written motion for production supple-

primary emphasis on federal authorities in discussing the good cause requirement:

> "[T]he trial judge in the case at bar issued a rule to show cause, which, under my view, was required procedure in this case. (However, as I shall point out, *a formal hearing may not be necessary in all cases.*) See 2A Barron and Holtzoff, Federal Practice and Procedure, §§ 801 and 802. . . . As I understand Article 1492, a *formal hearing should usually be held* when the taking of testimony is required to establish good cause. On the other hand, when good cause may be established by satisfactory documentary evidence alone, the documents may be attached to the motion, making a hearing unnecessary. A party aggrieved by the order to produce may then move to set aside that order. . . . Only in this manner do I feel that Article 1492 can be observed and the fundamental rights of litigants preserved. Schlagenhauf v. Holder. . . . These several reasons dictate a more rigid construction of the good cause requirement than has been utilized in the instant case." (Emphasis added.)[37]

This is in contrast to his dissenting language in *Raia v. WWL-TV*:[38]

> "I submit that in no instance, without hearing the adverse party, is a mover 'clearly' entitled to copy and examine documents of a litigant, his counsel or witness."[39]

Perhaps one can reconcile the conflicting language by placing emphasis upon the phrase "formal hearing" or by distinguishing the cases on the basis that one dealt with the production of X-rays and the other with certain published statements. It is submitted that no attempt should be made to distinguish the two cases because the later expression reflects further investigation and contemplation resulting in a more realistic approach.

It will be noted that the guideline set forth above as to when a hearing is necessary is actually a restatement of the article 963 test.[40] A mover is not entitled to production unless

mented by counsel's oral statement to the trial judge at the hearing on the rule. Based upon this understanding, it is my opinion that it was error to deny certiorari."

37. *Id.* at 847-49, 191 So.2d at 643-44.

38. 247 La. 1095, 176 So.2d 390 (1965).

39. *Id.* at 1106, 176 So.2d at 394.

40. LA. CODE CIV. P. art. 963 (1960): "If the order applied for by written motion is one to which mover is clearly entitled without supporting proof, the court may grant the order ex parte and without hearing the adverse party. . . ."

good cause is shown; therefore, when good cause is shown, he may be "clearly entitled" to the order. The "without supporting proof" of article 963 is interpreted to mean testimony.

It appears that the better rule is not to require a contradictory hearing upon every discovery motion under article 1492. Such a requirement would appeal to those dissatisfied with the manner in which some courts have interpreted good cause and administered the discovery practice in general. However, there is a point at which practicality must prevail,[41] and discovery procedure would have to shoulder an onerous burden if formal hearings were required upon every motion.

Discovery Orders

The administration of discovery orders varies across the state. No courts have been found which refuse to grant ex parte discovery orders under any circumstances. Unfortunately, however, there are courts which follow the extreme practice of signing orders of every description without reading a single item in the motion.[42] In jurisdictions where this is true, it is then up to the party against whom the order has been issued to rule the mover into court and bear the burden of upsetting the order. In the words of Justice Summers, this practice "shifts the burden from the party seeking production, where the burden squarely rests under Article 1492, to the shoulders of the party against whom production is sought—an obvious departure from fundamental standards of fairness."[43] What this does, in effect, is to use the "clearly entitled to" test after the fact. A device which enables

41. In addition, consider the interpretation of article 1492 by the court in Lindsey v. Escudé, 179 So.2d 505 (La. App. 3d Cir. 1965), at text accompanying notes 20 and 21 *supra*.

42. This appears deplorable. This view was reinforced after several instances of great abuse were revealed. Certainly, no judge is so busy that he cannot spare a moment at least to scan the order. "Justice delayed is justice denied" can be carried to the extreme. From a federal court, we find this view: Ordering of discovery and production of documents and things under Rule 34 is, in the last analysis, discretionary with the court, and whether good cause exists for such order lies in the sound discretion of the court. But "the Rule contemplates an exercise of judgment by the court, *not a mere automatic granting of the motion.*" (Emphasis added.) Martin v. Capital Transit Co., 170 F.2d 811, 812 (D.C. Cir. 1948).

43. Dugas v. Continental Cas. Co., 249 La. 843, 848, 191 So.2d 642, 644 (1966): "The burden of showing materiality of the information and ability to produce it rests on the one seeking discovery." Van Der Heydt v. Rogers, 251 F.2d 17, 18 (D.C. Cir. 1958): "It is not enough to say that production should be allowed unless the court is satisfied under the circumstances of the case that the administration of justice would be impeded by such production. Rule 34 requires an affirmative showing of good cause." J. MOORE, MANUAL—FEDERAL PRACTICE AND PROCEDURE § 15.06(4), at 1174 (1967).

one to invade another's privacy demands the best in administrative practices. The party desiring a change in the status quo should bear the burden.

Hopefully this practice is not widespread and a more equitable approach is employed. It would be better, for example, to establish the precise need for production and to ascertain whether there has been a good faith attempt by the mover to communicate with opposing counsel. If satisfied that the requirements of production have been met, the court would then issue the order, giving the party against whom it has been issued ample time to file a motion to quash. In this age of rapid communication it is not unreasonable to require the mover to make an *honest* effort to contact opposing counsel, if he be known.[44] Our liberal rules of pleading and discovery have been designed to remove any atmosphere of secrecy from the courtroom. In addition, it must be borne in mind that full disclosure, or the lack thereof, and discovery are two-edged swords, and the possibility of reciprocity should prompt cooperation.

Other Areas

Aside from discovery, one other case directly meets the issue of what can and cannot be done by way of an ex parte motion. In *Stevens v. Babineaux*[45] plaintiff obtained a preliminary judgment for workmen's compensation because defendant had failed to file an answer or other pleading within ten days after service of citation, as required by R.S. 23:1315-1316. Approximately two months later defendant filed an ex parte "Motion to Dismiss Preliminary Judgment," alleging that it had been improperly issued. Pursuant to this motion the trial court entered an order annulling and setting aside the preliminary judgment, without notice to plaintiff or a hearing. In fact, plaintiff did not even know of the order until informed of it in a letter from defense counsel, written in answer to a request for payment of the amount due under the preliminary judgment. The reviewing court correctly set aside the order dismissing the preliminary judgment because it was not "one to which the mover is clearly entitled." In the words of the court:

> "It was a motion asking for the annulment of a judgment to pay money, as to which there are very serious questions

44. If opposing counsel is one who does not return calls, he should have no reason to object to the procedure followed.

45. 196 So.2d 668 (La. App. 3d Cir. 1967).

of both law and fact. The motion should have been served on the plaintiff and tried contradictorily with him."[46]

The phrase "serious questions of both law and fact" should not be taken as an inflexible rule to be applied in every situation, but a good indication of the type of inquiry the court should make before granting an ex parte motion. Certainly, in such a case the mover is not "clearly entitled" to the order sought.

Other Jurisdictions

As the discussion above indicates, the courts of our state have not often faced the ex parte motion issue, and the Supreme Court has yet to specifically answer when such an order may be granted. A brief look at the situation which exists in a number of other jurisdictions follows.

Since our system of civil procedure is patterned to some extent after the federal system, it should be helpful to consult the Federal Rules to determine when an ex parte motion is permitted.[47] Under the Federal Rules the distinction between ex parte and "notice"[48] motions is important in that written ex parte motions need not be served.[49]

Despite the absence of helpful jurisprudence in the area,[50] some guidelines may nevertheless be gleaned from federal courts and authorities. A perusal of the Federal Rules of Civil Procedure reveals several provisions for ex parte motions which may be helpful.[51] The case of *Lindsey v. Escude*,[52] offers an example

46. *Id.* at 669.

47. Geolograph Serv. Corp. v. Southern Pacific Co., 172 So.2d 128, 129 (La. App. 1st Cir. 1965): In general, federal cases "are not controlling but they are persuasive in view of the fact that Federal Rules of Civil Procedure were promulgated long before the Louisiana Code of Civil Procedure went into effect."

48. United States v. Rollnick, 33 F. Supp. 863, 865 (M.D. Pa. 1940): "[S]ince the effective date of the New Rules of Civil Procedure, rules to show cause have not been properly a part of civil practice. Rule 7(b) provides that all applications to the court for orders shall be by motion. The rules and forms clearly indicate that motions are brought before the court by means of a 'notice of motion' which serves the purpose of a rule to show cause and obviates the necessity for obtaining such a rule." Although the above statement is true generally, there are certain instances in which a rule to show cause is proper or required. *E.g.*, 28 U.S.C.A. § 2243 (1952), providing for habeas corpus proceedings.

49. FED. R. CIV. P. 5(a).

50. See note 21 *supra*.

51. *E.g.*, see FED. R. CIV. P. 6(b) (extension of time); 6(d) (fix a different time for service of a written motion); 26(a) (leave to take depositions); 33 (leave to take interrogatories); 65(b) (temporary restraining order); and 38(b) (demand for jury trial).

52. 179 So.2d 505 (La. App. 3d Cir. 1965).

of Louisiana courts examining federal source provisions. The fact that the federal rules do not permit an ex parte order for a medical examination[53] apparently played an important role in the outcome of that decision.

In other jurisdictions one finds a similar paucity of guidelines. The Nevada Supreme Court, speaking in very broad terms, has said:

> "Ex parte motions, that is, motions without notice, are of various kinds and are frequently . . . permissible in procedural matters, and also in situations and under circumstances of emergency, as in the case of an application for an injunction to prevent irreparable injury which would result from delay, and where there is no speedy and adequate remedy at law."[54]

The court has not attempted to indicate when an ex parte motion of a general nature is permissible. It is noteworthy that it mentions the irreparable injury test—the same approach used by our Code in article 3603[55] with regard to temporary restraining orders. Because of its limited use as outlined in the applicable provisions, that test should not be used in any situations other than are specifically provided for. Texas cases offer no help in determining proper use of the ex parte motion.[56] In New York, where civil practice is a rather highly developed art, one finds this comment to one of their code articles:

> "What motions may be made ex parte is a question that keeps recurring. The answer is not supplied in all cases by statutory provision. In the absence of express statutory provision requiring notice, it has been said that the *real test is whether the adverse party is to be affected by the order.*" (Emphasis added.)[57]

It seems obvious that the test mentioned above is generally unworkable because in very few instances can an order be said

53. FED. R. CIV. P. 35.

54. Farnow v. Department 1 of Eighth Judicial Dist. Court, 64 Nev. 109, 178 P.2d 371 (1947).

55. LA. CODE CIV. P. art. 3603 (1960): "A temporary restraining order shall be granted without notice when it clearly appears from specific facts shown by a verified petition or by supporting affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had . . . ."

56. 39 TEX. JUR. 2d *Motions and Orders* § 1, at 243-69 (1962).

57. 7B McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANN. § 2217, at 37 (1963).

not to affect the other party. Where the other party is clearly unaffected, however, the rule of our Code more than adequately covers the situation by permitting issuance of the order.

Louisiana, therefore, is not out of line with other jurisdictions.[58] In fact we may be in a somewhat superior position because our Code at least makes a general attempt to formulate some type of test.

OBSERVATIONS

The failure of the bench to formulate guidelines based upon article 963 is understandable. One factor adversely affecting guideline formulation is the role that tradition and habit play in the practice of law. Practitioners are usually before judges whose attitudes toward the granting of ex parte orders are firmly established. When a new judge is developing his attitudes toward the subject, he is more likely to be conservative and little abuse of discretion is therefore found. Consequently, no cases are taken up for review. If the judge develops a liberal attitude and grants ex parte orders freely, practitioners are likely to become wary and take any precautions available to keep from being injured. Also, certain members of the bar will gain the reputation for taking advantage of the liberal practice and the remainder will be on guard against such acts. If a stranger enters the jurisdiction and has an unfortunate experience because of the local practice with which he is unfamiliar, he will probably regard it as an inevitable event.

A second factor discouraging concrete guidelines is the judiciary's able administration of motion practice. If there were widespread abuse of the trial judge's discretion the appellate decisions would reflect it.

A third factor is the general good faith of the bar as a whole. Although some members take advantage of loose administrative practices it is a credit to the legal profession that such practice is not more widespread.

However, the most important factor seems to be that an imprudently issued order can be challenged in the vast majority of the cases by a rule on the motion to quash. No doubt many attorneys tire of filing rules to show cause and carrying the

58. See Rodda, *Ex Parte Matters Relating to the Pleadings*, 41 LOS ANGELES B. BULL. 31, 41 (1965), for a discussion of matters peculiar to California pleading.

burden which rightly belongs on the other party, but seldom will there be a need to resort to application for supervisory writs.

CONCLUSION

Despite the lack of express statutory or jurisprudential guidelines, the Code of Civil Procedure itself may provide some guidance. By using a technique similar to that employed in *Lindsey*,[59] one can analyze the subject covered by the order in question to compare it with a subject for which a code article specifically provides either an ex parte order or a contradictory hearing as appropriate. In an appendix to this article a list of the various provisions which may be used in this process is provided. An inspection of some of the articles will reveal that neither the words "ex parte" nor "contradictory hearing" are present.[60] Following the reasoning of *Lindsey v. Escude*,[61] those which are worded "upon motion and notice" have been interpreted to require a contradictory hearing. The phrase "the court on its own motion or motion of an interested party"[62] is believed to indicate that an ex parte order is appropriate.

Although no hard and fast rule for applying the test of article 963 has been derived, the following approaches are suggested.

(1) If the issue involves discovery, the cases discussed,[63] as well as the federal materials, can furnish some guidance.

(2) Any test similar to that required for a temporary restraining order[64] would seem inappropriate outside the strict confines for which it was developed.

(3) Finally, whenever possible the issue at hand should be compared to a situation in the Code for which the proper approach is specifically set forth.

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59. Lindsey v. Escudé, 179 So.2d 505 (La. App. 3d Cir. 1965). See text at note 20 *supra*.

60. *E.g.*, see note 15 *supra*.

61. 179 So.2d 505 (La. App. 3d Cir. 1965). See text accompanying note 22 *supra*.

62. *E.g.*, LA. CODE CIV. P. art. 192 (1960): "A trial court, on its own motion or on motion of a party, may appoint persons learned or skilled in a science, art, profession, or calling as experts . . . ."

63. Raia v. WWL-TV, 247 La. 1095, 176 So.2d 390 (1965); Dugas v. Continental Cas. Co., 249 La. 763, 191 So.2d 141 (1966); Lindsey v. Escudé, 179 So.2d 505 (La. App. 3d Cir. 1965); American Mark Distributing Corp. v. Louisville & Nashville R.R., 180 So.2d 869 (La. App. 4th Cir. 1965).

64. See note 55 *supra*.

APPENDIX

CONTRADICTORY HEARING REQUIRED

Article	*Subject*
122*[1]	Change of venue
595*	Requiring plaintiff to provide security for costs
964*	Motion to strike
1452	Orders for protection of parties and deponents
1493	Physical and mental examination of parties[2]
1495	Right of party examined to other medical reports (when objection raised)
1951	Amendment of judgment[3]
1971*	Granting new trial
1972*	Peremptory grounds for new trial
2296*	Reduction of excessive seizure under writ of fieri facias
2377*	To have inferior creditors' claims referred to proceeds of judicial sale
2413*	Effect of garnishee's failure to answer[4]
2414*	Creditor's motion to traverse answer of garnishee
2502*	Writ of distringas[5]
3006*	Absent heir's opposition to sending heirs present into possession without an administration of the succession
3007*	Creditor may demand security when heirs sent into possession
3135*	Traversal of procès verbal of public inventory[6]
3137*	Traversal of descriptive list of succession property
3182*	Removal of succession representative[7]

1. * indicates that the article actually says "by contradictory hearing" or "rule to show cause," or similar language.

2. Following the interpretation of Lindsey v. Escudé, 179 So.2d 505 (La. App. 3d Cir. 1965).

3. LA. CODE CIV. P. art. 1951, comment (e) (1960): "The above article follows Fed. Rule 60(a) in providing for notice at the discretion of the court. Art. 547 of the 1870 Code does not contain a similar provision. However, it has been held that there is no error in correcting the name of a defendant, erroneously described, without citing him to show cause why the correction should not be made, where the error was of little or no importance. Town of Mandeville v. Paquette, 153 La. 33, 95 So. 391 (1922). A contradictory motion is required, however, to amend judgments giving incorrect description of realty. Jackson v. Brewster, 169 So. 166 (La. App. 1936); *cf.* Succession of Corrigan, 42 La. Ann. 65, 7 So. 74 (1890). . . ."

4. *Id.* art. 2413, comment (a): "This article changes the rule announced in Winnfield Furniture Company v. Peyton, 171 La. 519, 131 So. 657 (1930), authorizing the seizing creditor to obtain a judgment pro confesso against the garnishee by ex parte motion, by requiring a contradictory motion before judgment may be rendered against him."

5. *Id.* art. 2502, comment (c): "Art. 636, Code of Practice of 1870, provides that the writ issues 'on motion' of the judgment creditor, but does not indicate whether the proceedings are ex parte or contradictory with the judgment debtor. In accordance with the accepted practice, this article requires a contradictory motion or rule to show cause. . . ."

6. *Id.* art. 3135, comment (b): "Although in many cases the inventory is 'approved and homologated' by the court ex parte, there is no statute or jurisprudential rule which either requires or gives effect to such homologation . . . ."

7. Throughout this appendix the language "the court on its own motion or on motion of any interested party" has been interpreted to mean an ex parte proceeding is appropriate. However, this article specifically provides for a rule to show cause.

3321*	Interim allowance for maintenance during administration
3361*	Sending heirs into possession after homologation of final tableau of distribution (intestate succession)
3362*	Sending heirs into possession prior to homologation of final tableau of distribution (intestate succession)[8]
3371*	Sending legatee into possession after homologation of final tableau of distribution (testate succession)
3372*	Sending legatee into possession prior to homologation of final tableau of distribution (testate succession)
3381*	Judgment of possession
3394*	Refusal or inability to accept funds on part of heir or creditor of succession
3505*	Reduction of excessive seizure under writ of attachment or sequestration
3506*	Dissolution of writ of attachment or sequestration
3544	Plaintiff's security for issuance of writ of attachment[9]
3602	Preliminary injunction
3607	Dissolution or modification of temporary restraining order or preliminary injunction
3992*	Consent of parent or tutor for judicial emancipation
4069*	Separate tutor for property (when motion is made by one not tutor nor entitled to be tutor)
4234*	Removal of tutor
4609*	Homologation of partition
4623*	Partition when co-owner an absentee
4731*	Eviction
5123*	Testing sufficiency and validity of judicial bond
5184*	Traversal of affidavits of property in action in forma pauperis

EX PARTE MOTION AVAILABLE

Article	*Subject*
154	Recusation of district court judge
159	Recusation of supreme court justice
160	Recusation of judge of court of appeal
192	Authority of trial court to appoint experts
282	Acts which may be done by district court clerk
283	Orders and judgments which may be signed by district court clerk
464	Change of venue when cumulation is improper
465	Separate trials of cumulated actions
531	Suits pending in Louisiana court or courts
532	Suits pending in Louisiana and federal or foreign court
561**[10]	Abandonment in trial and appellate court

8. LA. CODE CIV. P. art. 3362, comment (b) (1960): "However, since an administrator has been appointed to represent creditors, the heirs are not sent into possession ex parte but only in a proceeding contradictory with the administrator, who may show to the satisfaction of the court that the heirs should not be sent into possession or that they should be compelled to furnish security . . . ."

9. *Id.* art. 3544, comment (b): "The phrase 'on proper showing' is taken from Art. 245 of the Code of Practice and contemplates a contradictory proceeding. . . ."

10. ** indicates that the article specifically provides for an ex parte motion.

801**	Voluntary substitution for deceased party
802**	Compulsory substitution for deceased party
1154	Amendment to conform to evidence
1293	Service by private person
1354	Subpoena duces tecum[11]
1492	Discovery and production of documents and things for inspection, copying, or photographing[12]
1495	Right of party examined to other medical reports (if no objection)
1601	Discretionary grounds for continuance[13]
1671	Voluntary dismissal
1672	Involuntary dismissal
1951	Amendment of judgment[14]
2121	Method of appealing
2453**	Judgment debtor examination
2881**	Probate of testament (if no objection)
2889**	Taking of depositions for probate matters
3001**	Putting into possession heirs and spouse of intestate
3004**	Discretionary power to put heirs and spouse of intestate into possession
3031**	Sending legatees into possession
3082	Confirmation of executor
3083	Appointment of dative testamentary executor
3111	Appointment of provisional administrator
3137**	Amendment of descriptive list of succession property
3155**	Creditor may compel executor to furnish security
3181	Revocation of appointment or confirmation of succession representative (if no qualification within ten days)
3225**	Continuation of business under succession representative
3331	Filing of account by succession representative
4069	Separate tutor of property (if motion is made by tutor or person entitled to tutorship)
4549	Appointment of provisional curator
4657**	Limitation of time in which to answer in concursus proceedings
5091**	Appointment of attorney to represent certain persons
5183**	Application for action in forma pauperis

11. United States v. J. Slotnik, 3 F.R.D. 408, 409 (D. Conn. 1944). The following language with regard to Federal Rule 45, the source provision of article 1354, is pertinent: "Merely because Rule 34 conditions the production of documents by the party upon a motion after notice it does not follow that Rule 45, providing for subpoenas to witnesses who may or may not be parties, contemplates that the writ shall issue only after notice. Instead, it is more plausible to believe that the express provision of Rule 45(b) for motions to quash the subpoena was intended as a substitute rather than an auxiliary safeguard for the advance notice required under Rule 34. . . . But the subpoena necessarily issues in advance of a stated return date and the intervening period generally furnishes opportunity to present a motion to quash if grounds exist therefor."

12. Following the reasoning of Lindsey v. Escudé, 179 So.2d 505 (La. App. 3d Cir. 1965).

13. LA. CODE CIV. P. art. 1605, comment (1960): "Although as a practical matter many continuances are granted ex parte by the court, the above article provides an opportunity for controverting the application."

14. See note 3 this appendix *supra*.