



Julie A. Goren

CCP section 12c resolves one calendaring problem, but leaves another in its wake

Is setting a date all that difficult? Understanding the difference between *calendar* and *court* days can create major calendaring headaches

On January 1, 2005, the notice of motion period set forth in Code of Civil Procedure section 1005, subdivision (b), was changed from 21 *calendar* days to 16 *court* days. That seemingly innocuous amendment created tremendous uncertainty with respect to calculating the last day to serve moving papers when service was by mail, fax or overnight delivery. Six years later, on January 1, 2011, the confusion ended with the enactment of section 12c (all section references are to the Code of Civil Procedure) ... but a new, much less obvious problem now lurks.

The problem with the January 2005 amendment

The January 2005 amendment to section 1005, subdivision (b), based the notice period on *court* days instead of *calendar* days. It left untouched the provisions relating to the amount of time which must be added when service is by mail (five *calendar* days within California), or by fax or overnight delivery (two *calendar* days). As a result, calculating the last day to serve moving papers by mail, fax or overnight delivery requires counting a combination of *court* days and *calendar* days; i.e., 16 *court* days plus five *calendar* days for mail service within California, and 16 *court* days plus two *calendar* days if service is by fax or overnight delivery.

Unaware that there could be more than one way to apply the statute, the drafters did not foresee that the parties and the court might reach different conclusions as to the last day to serve notice. In fact, different results will be reached depending upon: (1) the *direction* in which the days are counted (forward from the service date versus backward from the hearing date), and/or (2) the *order* in which the two distinct sets of days are counted (first *calendar* days, then *court* days versus first *court* days, then *calendar* days). Generally, calculations

involving service by mail will differ when a weekend immediately precedes the hearing date or immediately follows the service date. Thus, calculations relating to hearings scheduled on Mondays, Tuesdays following Monday holidays, and Fridays will vary depending on the counting method. This is best explained by example.

Assume you have a September 6, 2011, hearing date (the Tuesday after Labor Day) for a motion you intend to serve by mail. If you calculate the last day to serve notice by counting backward from the hearing date 16 court days plus five calendar days, you will find that August 5 is the last day to serve notice. If, however, you switch the order of the sets of days, counting backward from the hearing date first five calendar days and then 16 court days, the deadline falls on August 10 – a five-day difference.

Alternatively, if you were to switch the direction in which you count, counting forward from a proposed August 10 service date first 16 court days and then five calendar days, you would land right on the hearing date, seemingly indicating timely notice. But, if you switch the direction and the order, counting forward from August 10 first five calendar days and then 16 court days, you would land on September 7, one day after the hearing, indicating too little notice. Counting forward from a proposed August 5 service date results in either a September 1 or a September 6 hearing date, indicating that the September 6 hearing date is certainly far enough out, but could the hearing date be as early as September 1 if notice is served on August 5?

Although one should always err on the side of giving more as opposed to less notice, which method of counting is correct? The question was finally answered on January 1, 2011, with the enactment of section 12c.

The January 2011 fix

A result of State Bar-sponsored legislation (AB 2119 (Iran)), section 12c provides:

(a) *Where any law requires an act to be performed no later than a specified number of days before a hearing date, the last day to perform that act shall be determined by counting backward from the hearing date, excluding the day of the hearing as provided by Section 12.*

(b) *Any additional days added to the specified number of days because of a particular method of service shall be computed by counting backward from the day determined in accordance with subdivision (a).*

The methodology is now quite clear: (1) the *direction* is backwards from the hearing date; and (2) the *order* is the specified number of days first, and the extra days second. So, to calculate the last day to serve notice of a section 1005 motion by mail, count backward from the hearing date 16 court days, and then continue counting backward five calendar days. Thus, using our September 6, 2011, hearing date as an example, the last day to serve notice is August 5, 2011, not August 10.

Section 12c unquestionably brings much-needed certainty to this particular issue. With that settled, *once a hearing date is set*, everyone should be counting in the same direction and in the same order, and everyone should be able to agree whether notice was timely.

But, now there is an entirely new hearing-related problem which may result in inadequate notice.

The new problem

Practitioners must now be very careful when they select their hearing dates. In some courts, the litigant selects the hearing date; in others, the court assigns

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it. In either case, the moving party will select, or request that the court assign, *what the moving party believes* is the earliest possible hearing date. How does the moving party typically determine the earliest possible hearing date? By counting *forward* from the proposed service date. Therein lies the problem.

Assume it is Monday, December 5, 2011. You have just put the finishing touches on your motion. You simply need to select the first available hearing date, add it to your moving papers, and mail them that day. So, how are you going to figure out the earliest possible hearing date? Aren't you going to count *forward* from December 5, 2011, 16 court days and five calendar days, landing on January 3, 2012? And if January 3 is available, won't you select it as your hearing date, and mail your papers on December 5?

If you do that, you will not have given sufficient notice! Under section 12c, moving papers for a Tuesday, January 3, 2012, hearing would have had to be mailed on or before Friday, December 2, 2011 – three days before the motion was even ready!

The problem is that the factors necessitating section 12c still linger. Selecting a hearing date by counting forward from a Monday or a Tuesday service date will always result in inadequate notice under the section 12c counting methodology when service is by mail. Other methods of service on other days of the week can also be problematic. For example, if you count forward from Thursday, September 15, 2011, to determine the first available hearing date after service by overnight delivery (16 court days plus two calendar days), you would select an October 11, 2011, hearing date. But, if you count backward from October 11, 16 court days plus two calendar days, you would find that service would have had to be made one day earlier, on Wednesday, September 14.

You might think the solution is simply to reverse the order in which you count forward to select your hearing date, i.e., count the calendar days first, and then count the 16 court days, so that the two sets of days are in the order dictated by section 12c. Unfortunately, that won't work. Using the Monday, December 5, 2011, service by mail example, if you count forward five calendar days and 16 court days, you would select a January 4, 2012, hearing date, but when you count backward from January 4 pursuant to section 12c, you will discover that notice would have had to be served by mail by three days earlier, on December 2, 2011.

Possible solutions

So, how can you avoid this pitfall? Here are a few options to consider.

- After you count forward to pick a hearing date, always count backward to make sure you have time to serve by the method you selected. If there is insufficient time, move the hearing date out a day or two, and then count backward again to see if that works, adjust again as necessary, etc. Unfortunately, this may be rather time-consuming.
- In applying the first option, as soon as you discover that you are unable to serve by the method you selected, switch to a method which takes less time; e.g., instead of serving by mail, serve by fax (if you have the agreement required by Cal. Rules of Court, rule 2.306(a)(1)) or by overnight delivery. But, you still must count backward again to make sure that the alternate service method provides sufficient notice.
- Always build in a safety cushion by moving your hearing date out by a given number of days. But how much is enough? How much is too much? Could an unnecessary delay in obtaining the requested relief adversely affect your client's interests?

- Avoid the issue entirely by serving motions only by hand. No matter which direction you count 16 court days, the result will be the same. But, this would not only waste money, it would often be impractical or simply impossible.
- Another way to avoid the problem entirely is to electronically serve the moving papers, but the other party must first consent to electronic service (section 1010.6). The benefit of electronic service is that it adds two *court* days. Regardless of the direction you count, 18 court days is 18 court days.
- Find an automated rules-based calendaring program with a "Select My Hearing Date" feature. Ideally, once the proposed service date is entered, the program would instantly generate an *accurate* list identifying the first available hearing date for each service method.

Bear in mind that the problem described in this article is not limited to "regular motions" pursuant to section 1005. The same problem occurs with section 437c motions. There, the 75-calendar day notice period would have to be coupled with two *court* days for fax service, overnight delivery, and electronic service.

While section 12c dictates the method for determining the last day for notice under section 437c, hearing date selection remains a tremendous challenge. Tread carefully!

Julie A. Goren, Esq. is the author of Litigation By The Numbers® — Fourth Edition ("LBTN"), a loose leaf updated every January and July with over 440 pages devoted solely to California civil litigation procedure. She has also written several other articles on procedure, particularly state court calendaring. To review excerpts from LBTN and read testimonials from attorneys who rely on LBTN in their practices, go to www.litigationbythenumbers.com.

