



Protective Orders & The Advocates' Role

Fall 2018 65-Hour SA/DV/HT Training

September 18, 2018

Who We Are

- Founded in 2012, FVAP is the first ever non-profit organization in California dedicated to providing legal representation and support to domestic violence survivors at the appellate level.
- FVAP partners with pro bono attorneys from California's top law firms and corporate legal teams to provide free, high-quality legal representation to low- and moderate-income survivors, giving them the best chance at appeal.
- FVAP also provides technical assistance to attorneys, domestic violence advocates, and self-represented litigants on domestic violence issues arising in family law cases.

Objectives

- Today's presentation will discuss:
 1. The unauthorized practice of law and the difference between legal information and legal advice
 2. The different types of civil and criminal restraining orders available to survivors of domestic violence/sexual assault/human trafficking
 3. The court process and the role of the domestic violence/sexual assault/human trafficking advocate in this process

Unauthorized Practice of Law

- Non-attorneys are prohibited from engaging in the unauthorized practice of law (California Business and Professions Code § 6125 et. seq.)
- All non-attorneys assisting domestic violence/sexual assault/human trafficking survivors should be aware of this prohibition.
- It's important to know the distinction between providing a client with legal information and legal advice

Unauthorized Practice of Law

- What is the unauthorized practice of law?*
- ▣ California Business and Professions Code prohibits a lay person from:
 - 1) Practicing law or
 - 2) Holding him/herself out as someone who is entitled to practice law

*Adapted with permission from “Ethical Legal Advocacy: Issues for Domestic Violence Advocates” © 2012 by Erin Scott, Family Violence Law Center and Jessica Dayton, Communities Overcoming Relationship Abuse

What is “Practicing Law”?

- Providing **legal advice**:
 - ▣ Explaining the law and **applying it to a specific set of facts** (i.e., the client’s situation)
 - Example #1: “Based on what you’ve told me, there’s enough evidence for you to get a restraining order”
 - Example #2: “You should ask for child support in your TRO”
- Providing opinions on a client’s legal issues
- Predicting the outcome of a client’s case
- Representing the client in court
- Completing court forms **based on having interviewed the client**
- Coaching a client on giving answers they believe to be legally advantageous

What is NOT “Practicing Law”?

- Providing **legal information**:
 - ▣ Giving a client information about the court system or the law
 - Example #1: “The judge will decide whether to grant your request for a temporary restraining”
 - Example #2: “The temporary restraining order application allows you to request child support”
 - ▣ Providing court forms to a client
 - ▣ Completing court forms **at the client’s direction**
 - ▣ Providing manuals or guides to a client on how to complete court documents, without personalized advice
 - ▣ Providing emotional support to a client at a court hearing

Hypotheticals: Legal Information v. Legal Advice

- **Hypo #1:** The existence of a law
 - ▣ This is OK!
- **Hypo #2:** How some judges interpret the law
 - ▣ This is NOT ok!
- **Hypo #3:** Where to go to file, get help, find an attorney
 - ▣ This is OK!
- **Hypo #4:** Advice on what to say at court
 - ▣ This is NOT ok!

Restraining Orders in California

- What is a restraining order?
 - ▣ “A restraining order (also called a “protective order”) is a court order that can protect someone from being physically or sexually abused, threatened, stalked, or harassed” (California Courts, The Judicial Branch of California, www.courts.ca.gov)
 - ▣ There are a variety of civil and criminal restraining orders available in California
 - But remember: not all restraining orders offer the same types of protections, and can require the person asking for the restraining order to show different things

Types of Restraining Orders

- **Criminal/Civil Restraining Orders:**
 - ▣ Emergency Protective Restraining Orders (EPOs)
- **Criminal Restraining Orders:**
 - ▣ Criminal Protective Orders (CPOs)
- **Civil Restraining Orders:**
 - ▣ Domestic Violence Prevention Act Restraining Orders (DVROs)
 - ▣ Civil Harassment Restraining Orders (CHOs)
 - ▣ Elder & Dependent Adult Abuse Restraining Orders (EAROs)
 - ▣ Workplace Violence Restraining Orders (WVROs)
 - ▣ Gun Violence Restraining Orders (GVROs)

Criminal/Civil Restraining Orders: EPOs

- Emergency Protective Orders (EPOs):
 - ▣ An EPO is a temporary **ex parte** restraining order
 - Ex parte = issued by a bench officer without notice to the opposing party
 - ▣ An EPO is **temporary**, and will be effective for no more than five (5) court days, or seven (7) calendar days
 - EPOs should state the date of expiration
 - ▣ A request for an EPO must come from a **law enforcement officer** but advocates can support survivors in asking the officer to make the application

Criminal/Civil Restraining Orders: EPOs

- EPOs can be issued under **both** the California Family Code or the California Penal Code
 - ▣ **Family Code § 6250:** An EPO can be issued by an on-call judge at the request of a law enforcement officer where there are reasonable grounds to believe there is immediate and present danger of domestic violence, child abuse, child abduction, stalking, or elder/dependent adult abuse
 - ▣ **Penal Code § 646.91:** An EPO can be issued by a judicial officer at the request of a peace officer if there are “reasonable grounds to believe that a person is in immediate and present danger of stalking...”
 - Penal Code is more narrow here – limited to stalking

Criminal Restraining Orders: CPOs

- If the person who caused harm is charged with a criminal offense, the **District Attorney may apply for a CPO protecting the victim of crime** (California Penal Code § 136.2)
- Scope of orders in CPO include: no contact, stay away, residence exclusion, relinquish firearms, no communication with the victim except through attorney
- If CPO does not state expiration date, CPO will expire three (3) years from date of issuance
- **CPOs follow criminal charges**—a CPO can be terminated if charges are dropped, case is dismissed, or the defendant is acquitted

Civil Restraining Orders

- Civil restraining orders are different from criminal restraining orders, and can be applied for without involvement from law enforcement or criminal court
- TRO is shorthand for “temporary restraining order”
 - ▣ TROs are **ex parte emergency orders**, which means they can be issued by a judge without notice to a party
 - ▣ TROs are **temporary**, and if granted, will be in effect for approximately three (3) weeks
- Longer-term restraining orders are only issued after a noticed court hearing in front of a judge
 - ▣ Restraining orders issued after a noticed hearing are called Restraining Orders After Hearing (ROAHs)

The Civil Restraining Order Process

- There are several steps in the civil restraining order process:
 1. Survivor completes and files request for TRO
 2. Request for TRO is reviewed by a judge, who determines whether TRO is granted or denied
 3. The opposing party must be personally served with a copy of the TRO and the notice of the hearing on the request (whether granted or denied)
 4. Court hearing is held to determine if a Restraining Order After Hearing should issue (whether initial TRO was granted or denied)

Step #1: Applying for TRO

- To apply for a temporary restraining order, the survivor will need to complete the required court forms, along with a supporting declaration.
- Remember, there are many types of civil restraining orders and each one requires its own set of forms
 - ▣ Today, we will only discuss TROs in the context of:
 - Domestic Violence Restraining Orders
 - Domestic Violence Prevention Act
 - Civil Harassment Restraining Orders
 - California Code of Civil Procedure

Domestic Violence Restraining Orders

- **Domestic Violence Prevention Act (“DVPA”):** enacted in 1979 and codified in California Family Code §§ 6200 et seq.
 - ▣ **Purpose:** to prevent domestic violence and provide for the separation of the parties for a sufficient period of time to allow the parties to seek a resolution of the causes of the violence.
 - ▣ **Effect:** the DVPA authorizes courts to issue ex parte orders (EPOs and TROs) and orders after hearing (ROAHs)

Domestic Violence Restraining Orders

- **Relationship Requirement (Family Code § 6211):**
 - A spouse or former spouse
 - A cohabitant or former cohabitant (defined by § 6209)
 - A person with whom the respondent (opposing party) is having or has had a dating or engagement relationship
 - A person with whom the respondent has had a child
 - A child of a party or a child who is the subject of a parentage action
 - Any other person related by consanguinity or affinity within the second degree

Domestic Violence Restraining Orders

□ Abuse defined:

■ California Family Code § 6203:

- (1) To intentionally or recklessly cause or attempt to cause bodily injury.
- (2) Sexual assault.
- (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
- (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.

Domestic Violence Restraining Orders

- **Abuse defined (continued):**
 - ▣ **California Family Code § 6320:** “molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in Section 528.5 of the Penal Code, falsely personating as described in Section 529 of the Penal Code, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party...”

Domestic Violence Restraining Orders

□ **Declarations:**

- The TRO application will ask the survivor for a description of the abuse, starting with the most recent incident and ending with the oldest
- Advocates often assist with the declaration writing process, but must exercise caution
 - Why?
 - Because advocates cannot engage in the unauthorized practice of law. This means that advocates cannot interview the survivor to complete the declaration – they can only complete the declaration at the direction of the survivor

Domestic Violence Restraining Orders

▣ **Scope of Requests:**

- No contact
- Stay away
- Custody & visitation
- Support (child & spousal)
- Move out order
- Property control
- Debt Payment
- Gun restrictions
- Phone plan
- Protection of animals
- Property restraint
- Record unlawful communications
- Insurance restraint
- Attorney fees
- 52-week Batterer Intervention Program
- Other orders as appropriate

Step #2: Judge Reviews TRO Request

- After the survivor completes the TRO application, it will be filed in superior court
- There is no fee for filing a TRO application
 - ▣ However, California Supreme Court recently decided *Jameson v. Desta*, which said that low-income people with a granted fee waiver are entitled to a free court reporter in civil cases
 - ▣ What does this mean?
 - Low-income survivors should be able to obtain a free court reporter for their restraining order and/or family law case if they file a fee waiver request and the request is granted, and then request a court reporter

Step #2: Judge Reviews TRO Request

- Once the TRO application has been filed at court, a bench officer (judge or commissioner) will review the TRO application and determine whether to grant or deny the TRO
- What is the bench officer looking for at this point?
 - ▣ **Reasonable proof** of past act or acts of abuse (California Family Code § 6300)
- Remember: only a bench officer can decide whether to issue a restraining order
 - ▣ Why is it important to keep this in mind?

Step #3: Personal Service

- Once the TRO has been ruled on by a bench officer, the survivor (the protected party/petitioner) will receive copies of the TRO and/or notice of a hearing
 - ▣ If the TRO is not granted, there will still be a hearing scheduled about whether to issue a long-term restraining order, but the petitioner will not be protected by a TRO before that hearing
- The hearing notice provides the date the parties are to appear in court for the restraining order hearing
- In order for the court to proceed to a hearing on the restraining order, the opposing party (the restrained party/respondent) must be **personally served** with a copy of the TRO and notice of hearing

Step #3: Personal Service

- What is personal service?
 - ▣ Personal service means handing paperwork to the opposing party, in person
 - ▣ Personal service gives the opposing party notice that there is a restraining order against them
 - ▣ Personal service must be done by someone who is:
 - 18-years-old or older AND
 - Not a party to the action
 - ▣ Generally, the opposing party must be personally served with the TRO at least 5 days prior to the court hearing
- The sheriff's department will often serve restraining order paperwork in-county free of charge

Step #4: Going to Court

- If the opposing party was properly served with the TRO, an evidentiary hearing will be held in court to determine whether to issue a Restraining Order After Hearing (ROAH)
 - ▣ A ROAH can be requested for a **maximum of 5 years**, and can be renewed for either 5 years or permanently (California Family Code § 6345)
 - ▣ A ROAH may contain some, or all, of the same orders as were made in the TRO request (e.g., custody/visitation, no contact, stay away, protection of animals, etc.)

Step #4: Going to Court

- What happens at the evidentiary hearing?
 - ▣ The survivor will be asked by the court (or their attorney) to present evidence on the statements they have made in their request for restraining order
 - Testimony and documentary evidence
 - What is testimony?
 - What is documentary evidence?
 - ▣ The opposing party will then have the opportunity to present their evidence in defending themselves against the restraining order

Step #4: Going to Court

- Who decides what evidence can be presented?
 - ▣ The judge decides what evidence is admissible and what evidence is not admissible
- What must the survivor show in order for the court to issue a Restraining Order After Hearing?
 - ▣ **Burden of Proof:** the survivor must show the court that an act or past act of abuse occurred by a ***preponderance of the evidence***
 - Often referred to as the “more likely than not” standard

Step #4: Going to Court

- What is the role of the advocate at court?
 - ▣ **Court accompaniment**
 - Meeting the survivor at the courthouse
 - Finding the correct department
 - ▣ **Support person (California Family Code § 6303)**
 - Sitting at counsel table silently (if no attorney)
 - Accompanying survivor to mediation silently
 - ▣ **Helping the survivor navigate the process**
 - Explaining the court process without giving legal advice

Civil Harassment Orders

- **California Code of Civil Procedure § 527.6(a)(1):**
 - “A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section.”
- There is **no relationship requirement** for requesting a Civil Harassment Order
 - If no relationship requirement is needed, who might file for a Civil Harassment Order?

Civil Harassment Orders

□ Harassment Defined:

- ***Unlawful violence*** – assault, battery, or stalking; not lawful self-defense or defense of others (California Code of Civil Procedure § 527.6(b)(7))

OR

- ***Credible threat of violence*** – knowing and willful statement or course of conduct that would place a reasonable person in fear for self or immediate family, and serves no legitimate purpose (California Code of Civil Procedure § 527.6(b)(2))

OR

Civil Harassment Orders

□ Harassment Defined (Continued):

- ***Knowing and willful course of conduct*** directed at specific person that seriously alarms, annoys, or harasses the person and that serves no legitimate purpose (CA Code of Civil Procedure § 527.6(b)(3))
 - ***Course of conduct*** is a pattern of conduct composed of series of acts over a period of time, however short, evidencing continuity of purpose (§ 527.6(b)(1))
 - Conduct that would cause a reasonable person to suffer substantial emotional distress and actually caused the petitioner to suffer substantial emotional distress (§ 527.6(b)(3))

Civil Harassment Orders

- The steps in the CHO process are the same as in the DVRO process:
 1. Survivor completes and files request for CHO
 2. Request for CHO is reviewed by a judge, who determines whether CHO is granted or denied
 3. The opposing party must be personally served with a copy of the TRO and the notice of court hearing (whether granted or denied)
 4. Court hearing is held to determine if a Civil Harassment Restraining Order After Hearing should issue (whether the initial CHO was granted or denied)

Civil Harassment Orders

- What does the petitioner (protected party) need to show the court?
 - ▣ For Civil Harassment ex parte order (TRO):
 - **Reasonable proof** of harassment by opposing party (respondent), and that great or irreparable harm would result to petitioner (CCP § 527.6(d))
 - ▣ For Civil Harassment Restraining Order After Hearing:
 - **Clear and convincing evidence** (CCP § 527.6(i))
 - This is a higher level of proof than what is needed to obtain a Domestic Violence Restraining Order After Hearing

Civil Harassment Orders

□ **Scope of Requests:**

- Personal conduct
- Stay away
- Firearm restrictions
- Attorney fees and costs
- Protection for animals

□ **Does NOT include:**

- Residence exclusion (move out)
- Child custody/visitation
- Property restraint
- Insurance restraint
- Debt payment
- Record unlawful communications

Civil Harassment Orders

- **California Code of Civil Procedure § 527.6(w)**
- There is no filing fee for a petition that alleges that opposing party has:
 - 1) Inflicted or threatened violence against the person requesting the CHO (petitioner);
 - 2) Stalked the petitioner; or
 - 3) Acted or spoken in a manner that has placed petitioner in reasonable fear of violence
- If none of these apply, filing for a CHO could cost a significant amount of money (e.g., \$435)

Civil Harassment Orders

- **California Code of Civil Procedure § 527.6(x):**
 - ▣ No fee for service by sheriff's department if:
 - 1) Order is based on stalking; or
 - 2) Order is based on unlawful violence or credible threat of violence
 - ▣ Similar to a DVRO application, a survivor may need to complete a local court form, or a sheriff's instruction sheet to request that the sheriff's department personally serve the Civil Harassment Order on the opposing party prior to the hearing

Civil Harassment Orders

- How long can a CHO last?
 - ▣ Following a noticed hearing, CHOs can be issued for a **maximum of 5 years** (CCP § 527.6(j)(1))
- Can a CHO be renewed?
 - ▣ Yes! Similar to a DVRO, a CHO can be renewed if brought within three months prior to the expiration of the original order.
 - Does not require showing of further harassment
 - ▣ Can be **renewed for up to a maximum of 5 additional years**, but cannot be renewed permanently

Question & Answer

- Does anyone have any questions about what you have learned today?

- Legal advice vs. legal information
 - EPOs, CPOs, TROs
- The family & civil court process
 - The role of the advocate

Thank You!

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