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CALIFORNIA PENAL CODE SECTION 632: THE DILEMMA OF SECRETLY RECORDED EVIDENCE IN FAMILY LAW AND ABUSE CASES

HONORABLE JUDGE MARK JUHAS | LOS ANGELES COUNTY SUPERIOR COURT

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Imagine the following scenarios that occur in courtrooms across California:

1. Jill just testified to several acts of domestic abuse, which her ex-boyfriend, Joe, vehemently denies. You can see from the judge's expression that she is undecided about granting a domestic violence restraining order. Joe takes the stand, and he convincingly refutes the claim of domestic abuse, claiming some of it never happened and that Jill embellished the rest. Jill's attorney stands up, pulls out a laptop with a flourish and barks, "I am going to show you a recording that Jill took of the November 24th incident." In utter horror, Joe stammers, "Recording? What recording? I never knew someone was recording!" Joe's attorney immediately stands up and shouts, "I object—Penal Code section 632, Your Honor."
2. A self-represented father testified that he placed a voice-activated recording device inside the pocket of his son's backpack before he went to his mother's house for a weekend visit. Upon his son's return, father listened to the tape and, in violation of the current court orders, mother bad-mouthed the father and questioned the son endlessly about father's house. As father tries to submit the recording into evidence, mother's lawyer stands up and shouts, "I object—Penal Code section 632, Your Honor."
3. At an elder abuse restraining order hearing, the elder-victim produces a digital recording from a security camera she had placed inside her house. This camera takes one still photo every five seconds but does not record any audio. The jerky tape shows the abuser stealing money and prescription medications from the victim's purse. You can also see the victim walk in and confront the abuser, resulting in an obvious argument. Yet again, the alleged

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abuser's attorney stands up and shouts, "I object—Penal Code section 632, Your Honor."

The probative value of these recordings is undisputable; in fact, it may even be dispositive in these cases. The problem is that California Penal Code section 632[1] strictly forbids secretly recorded communications from being admitted into evidence.[2] For many legislative or evidentiary reasons, important, relevant, and potentially dispositive information is kept away from the court. This article explores when section 632 excludes recordings of confidential communications from evidence, and the occasions when such recordings, despite violating section 632, can be used in judicial proceedings.

The California Privacy Law Environment

An individual's right to privacy is of utmost importance in California. It is enshrined in the California Constitution: "All people are by nature free and independent and have inalienable rights. Among these are . . . obtaining safety, happiness and *privacy*."[3] In 1967, the California Legislature recognized that advancements in technology infringed upon privacy rights by creating devices and techniques that made it easier to eavesdrop on private communications.[4] To deter these privacy invasions, the Legislature passed the comprehensive California Invasion of Privacy Act, found at Penal Code section 630 et seq. (the "Act"). Among other things, the Act makes wiretapping and eavesdropping upon and recording confidential communications illegal and imposes civil and criminal penalties for these privacy violations.[5]

Section 632 addresses eavesdropping and recording of confidential communications. It provides, in relevant part:

> (a) A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine.

Thus, for section 632 to apply, a person must record by means of any electronic device a confidential communication intentionally and without the consent of all the parties.

Section 632 maintains the integrity of judicial proceedings by making unlawful recordings inadmissible in court proceedings. Subdivision (d) of section 632 states:

> Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not admissible in any judicial, administrative, legislative, or other proceeding.[6]

Related to, but distinct from section 632, is wiretapping under section 631. Wiretapping requires using a machine or any other means to intercept or listen in on a telephone conversation; whereas eavesdropping, under section 632, includes listening in on *any* confidential communication—even those that do not occur over the telephone—by means of an electronic amplifying or recording device.[7] Like section 632, section 631 excludes the derivative product of illegal wiretapping from being admitted into evidence.[8]

Notably, section 632 only prohibits electronic recording. Non-electronic eavesdropping on a confidential conversation and testifying to what was said is allowed.[9] Yet, this does not give license to surreptitiously listen to telephone conversations with impunity. The California Supreme Court in *Ribas v. Clark*[10] held that a defendant who listened to a divorce couple's telephone conversation at the behest of the ex-wife, and then testified to the conversation in the couple's litigation, may have violated section 631. If the testimony, however, does

not run afoul of section 631 and other prohibitions, such as privilege or hearsay, an overheard confidential conversation can be fully described in a court of law.

"Person" is Broadly Defined

Even though a recording is technically made by a machine, the jurisprudence relating to section 632 recognizes that a recording is made by the person, as a person causes the recording to be made. Subdivision (b) of section 632 explains that "person" means:

> An individual, business association, partnership, corporation, limited liability company, or other legal entity … but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

Whether this definition is met is a legal issue to be determined by the court.[11] As exemplified in the scenarios outlined above, for most, if not all, family law and abuse matters, the recording will be made by a person—here, the ex-girlfriend, father, and elder-victim.

Consent of Both Parties is Required

California, unlike several other states, mandates that all parties to a communication consent to the recording for it to be admissible. With modern technology, not all communications occur entirely within the State of California, creating choice-of-law issues. If the communication occurs with one or more out-of-state parties whose states require all-party consent, like California, then the analysis is straightforward.

If one of the parties is a resident of a state that allows only one party to consent to the recording, then the analysis is more complex. In determining a choice of law, the court must 1) examine each jurisdiction's interest in applying its own law to determine whether a true conflict exists, and 2) if such conflict exists, apply the law of the jurisdiction whose interest would be more severely impaired.[12]

Although there is a dearth of law applying this test in the family law and abuse context, if the propounding party is seeking to admit the recording against a resident who lives in a one-party consent state, then the existence of a "true conflict" would be unlikely. In *Reich v. Purcell*,[13] the California Supreme Court held there was no true conflict between the laws of Missouri and California because Missouri's interest expressed a local concern to avoid the imposition of excessive financial burdens on defendants in wrongful death actions. Considering Missouri's interest related to its residents, the *Reich* court explained that Missouri would have no interest in extending its law to out-of-state residents.[14] Likewise, California's Legislature has not expressed an intent to protect the privacy rights of foreign residents, especially those living in states that ascribe to the one-party consent law. Instead, the California Legislature has declared that section 632 is "to protect the privacy of the people of this state."[15]

Conversely, California's interest would be in conflict if the adverse party is a California resident. In such event, the recording would be inadmissible, unless the foreign state's interest would be more severely impaired. California's Legislature has expressed a strong intent to protect Californians' privacy rights: Privacy violations create a "serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society."[16] The California Supreme Court has also stated: "California must be viewed as having a strong and continuing interest in the full and vigorous application of the provisions of section 632 prohibiting the recording of telephone conversations without the knowledge or consent of *all* parties to the conversation."[17]

In light of these proclamations, it appears the foreign state's law would almost always yield in a California case, because allowing a person to record a confidential communication would impair the California resident's privacy protections.[18] However, this may not be the outcome in domestic abuse cases. The California Legislature has also expressed a strong interest in preventing domestic abuse.[19] In *Hogue v. Hogue*,[20] the appellate court went to great lengths to find personal jurisdiction over an out-of-state resident in a domestic violence restraining order case because of California's public policy against domestic abuse. Taking into consideration California's dueling interests between the right to privacy and domestic abuse prevention, a California appellate court could conclude that the foreign state's interest would be more severely impaired in the domestic abuse context.

The Communication Must Be Intentionally Recorded

Section 632 requires that an electronic recording of a communication be "intentionally" recorded. Intentionality is liberally defined:

> The recording of a confidential conversation is intentional if the person using the recording equipment does so with the purpose or desire of recording a confidential conversation, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation.[21]

Whether the recording was "accidental" would be a question of fact for the court,[22] the prime factor being whether the person believed in good faith that the recording device was off.

Communication is Broadly Defined

Only a "communication" is protected under section 632, which courts have defined to include all manner of communication, such as verbal, symbols, or actions. In *People v. Gibbons*,[23] the court held that secretly recording a sexual act with a partner violates section 632, because sexual relations are a form of communication. The court explained:

> In other contexts, communication has been recognized to include not only oral or written communication but communication by conduct as well. For example, in the area of attorney-client privilege, it has been recognized

that "[t]he privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. [Citations.] '[A]lmost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such.'" [Citation.] That sexual relations are a form of communication, be it communication of love, simple affection, or, simply of oneself, cannot be readily disputed.[24]

The *Gibbons* court acknowledged the broad, protective intent of the Act reinforced a definition of communication that was not solely limited to oral communications, even though certain terms in the Act, such as eavesdropping and telephone, could have been construed to be associated with only oral conversation.[25]

Yet, the definition of communication is not limitless. In *People v. Drennan*,[26] the court held that a hidden camera that does not capture any audio or other type of communication does not violate section 632. In *Drennan*, a school superintendent installed a camera in a high school principal's office without the knowledge or consent of the principal.[27] The camera, hidden in a fake smoke detector, was focused solely on the principal's desk to determine if an unauthorized person read or removed any confidential documents.[28] The camera took one photo every three seconds and did not record any audio.[29] While no tapes were kept or presented at trial, the trial testimony was that the cameras did not capture any meetings or anyone communicating in any manner with anyone else.[30]

The appellate court reversed the superintendent's criminal conviction under section 632, holding that it did not meet the definition of communication, because the cameras did not capture any act of anyone communicating by means of actions or signs.[31] Absent a communication, there was not, and cannot be, a violation of section 632.

The Communication Must Be Confidential—But May Be More Public Than You Think

Subdivision (c) of section 632 explains the term "confidential communication" means:

> [A]ny communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.[32]

Courts use an objective standard to determine whether a communication is confidential; a party's subjective belief is not dispositive.[33] A conversation is confidential "[i]f a party to [a] conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded."[34] "Whether there exists a reasonable expectation that no one is secretly recording or listening to a phone conversation is generally a question of fact."[35]

A party may have a reasonable expectation of privacy in a very public setting. In *Cuviello v. Feld Entertainment, Inc.*,[36] animal-rights activists, including Mr. Cuviello, demonstrated against a circus. As part of the demonstration, the pro-circus activists videotaped the animal-rights activists from a distance, and from the same distance, the animal-rights activists videotaped the pro-circus activists.[37] While standing on a public sidewalk, Mr. Cuviello looked around to ensure no one was within earshot before beginning to speak privately to another demonstrator.[38] Mr. Cuviello then noted someone was behind him recording his private conversation.[39]

Applying section 632, the federal court found that Mr. Cuviello had a reasonable expectation of privacy, even though he was on a public sidewalk, because the videographers had maintained a respectful distance allowing Mr. Cuviello to objectively believe he had a reasonable expectation of privacy.[40]

In *Safari Club Int'l v. Rudolph*,[41] the federal appellate court also held that a recording in a public setting was illegal under section 632. The court's opening paragraph sets forth the issue:

> Dr. Lawrence P. Rudolph is an award-winning hunter who made his way to the top of Safari Club International ("SCI"), a sport hunting and wildlife conservation organization. Following his term at the helm, various SCI members accused him of official misconduct, stripped him of his awards, and then exiled him permanently from the association . . . Rudolph sued SCI and its president, his friend, John Whipple. . . . With his quarry in sight, Rudolph lured Whipple to lunch, brought up the pending litigation, recorded the conversation surreptitiously, and then posted it on YouTube for public consumption.[42]

Mr. Whipple then sued under section 632.[43] The court held Mr. Whipple could have a reasonable expectation of privacy, even in a public restaurant because others could not overhear the conversation, and the participants stopped talking about anything of substance when anyone came near their table.[44]

In a family law setting, a difficult situation may arise when a family is having a private family dinner at home. A conversation at home would appear to be confidential. The objective expectations of the parties would depend on the nature of the discussion, who the participants were, and the context of the "family meeting." Depending on several facts, the presence of children may destroy the confidentiality of some or all of the communication.[45] If the adults and children are all part of the conversation, confidentiality may be maintained, thus requiring all parties, even the children, to consent to any recording. In listening to the recording, courts should evaluate whether all parties had a reasonable expectation that no one was secretly recording or listening to the conversation.

If the Communication was Recorded in Violation of Section 632, Is There Any Way It Can be Used in Family Law or Abuse Cases?

Although an unlawful recording will be rendered inadmissible, there are statutory exceptions that may apply. First, under section 633.5, a party may record a confidential communication to obtain evidence reasonably believed to relate to the commission of certain kinds of crimes,[46] including domestic violence[47] or any felony involving violence against the person, such as threats of physical violence.[48]

Second, in a domestic violence restraining order case, subdivision (a) of section 633.6 allows a court, upon request, to allow a confidential conversation to be recorded.[49] Third, subdivision (b) of section 633.6 allows a victim who is seeking a domestic violence restraining order to record a confidential communication to use as evidence in court, if the victim reasonably believes it may contain evidence germane to the restraining order.[50]

Additionally, the *Frio v. Superior Court* (1988) 203 Cal. App.3d 1480 case provides some hope for an otherwise inadmissible recording.

First, the *Frio* court held an illegal recording under section 632 may be used to refresh a witness's present recollection.[51] The court acknowledged that anything can be used to refresh a witness's recollection of past events: "Anything may in fact revive a memory: a song, a scent, a photograph, an allusion, even a past statement known to be false."[52] The court also clarified that even though the refreshing material was improperly obtained, the evidence before the court was not the recorded communication, but the witness's independent recollection from the witness stand.[53]

Second, the *Frio* court held an illegal recording under section 632 may be admitted for impeachment purposes, explaining that the "truth-finding function of trial [] is already strained" and should not be further burdened by allowing a witness to provide false testimony.[54] Accordingly, while a witness has the right to testify, a witness does not have the right to use section 632 as a shield to commit perjury.[55]

Conclusion

We now return to the scenarios at the beginning of this article, which required the court to rule on the section 632 objections. Each of the scenarios has aspects that may, or may not, allow the recording to be used as evidence, to assist the witness in their recollection, or as protection against a dishonest witness. As is too often the case in family law and abuse matters, the rulings on the various objections amount to "it depends" and the skill and knowledge of the attorney. In these types of cases, however, the key information you need to know is 1) whether there is a communication, 2) whether that communication is confidential (i.e., is there a reasonable expectation that no one was secretly recording or listening), and 3) whether a statutory or common law exception applies. Armed with this information, the next time Penal Code section 632 is presented in court, you will be able to explain why the ruling should be in your favor.

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1 All further references are to the California Penal Code unless otherwise identified.

2 This article focuses solely on California state law. There are federal laws prohibiting the recording of confidential communications and caution should be exercised with respect to these laws as they, like California law, create civil and criminal liability. (See, e.g., 18 U.S.C. 2510 et seq.; *Perfit v. Perfit* (C.D. Cal. 1988) 693 F.Supp. 851.)

3 Cal. Const., art. I, §1 (emphasis added); see Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepperdine L.Rev. 327, 417-420 <http://digitalcommons.pepperdine.edu/plr/vol19/iss2/1> (as of July 3, 2019).

4 Pen. Code, § 630 ("The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society. The Legislature by this chapter intends to protect the right of privacy of the people of this state.").

5 A person who violates section 632 may be criminally fined or imprisoned for up to one year. (See Pen. Code, § 632, subd. (a).) Even if no actual economic damages were suffered, a civil action may also be filed against a violator for an amount up to three times of the plaintiff's damages or five thousand dollars ($5,000), whichever is greater. (See *id.*, § 637.2.) The unlawful recording may be used as evidence in support of the criminal or civil action (see *ibid.*; see also Pen. Code, § 632, subd.(a)), and an actionable violation of section 632 occurs when the recording occurs, whether or not the recording is used or disclosed. (See *Kight v. CashCall, Inc.* (2011) 200 Cal. App.4th 1377, 1390; see also *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 425.)

6 The Family Code doubles down on the Penal Code. Family Code section 2022 states:

> (a) Evidence collected by eavesdropping in violation of Chapter 1.5 (commencing with Section 630) of Title 15 of Part 1 of the Penal Code is inadmissible.
>
> (b) If it appears that a violation described in subdivision (a) exists, the court may refer the matter to the proper authority for investigation and prosecution.

No precedent interprets this Family Code section.

7 Compare Pen. Code, § 631, subd. (a) with Pen. Code, § 632, subd. (a); see also *People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1168–1169 (describing the difference between sections 631 and 632).

8 See Pen. Code, § 631, subd. (c).

9 In *People v. Soles* (1977) 68 Cal.App.3d 418, 419, disapproved on another ground by *Ribas v. Clark* (1985) 38 Cal.3d 355, 360, the appellate court held a motel manager who

surreptitiously listened to her patron's telephone conversations on the motel's switchboard did not violate section 632, because section 632 does not prohibit "eavesdropping in general," rather "it applies only to the use of 'any electronic amplifying or recording device' to eavesdrop upon or record a confidential communication." The telephone extension did not constitute such a device, because it was not equipped with features for amplification or recording. (*Ibid.*) Although the California Supreme Court in *Ribas* did not reject this holding on section 632, it did disapprove the holding reached by the *Soles* court on section 631, which held that the manager's actions did not violate section 631. The *Ribas* court explained: "[T]o the extent that *Soles* viewed section 631 as merely encompassing the use of electronic amplifying and recording devices, it is erroneous." (*Ribas, supra,* 38 Cal.3d at p. 360.)

10 *Ribas v. Clark* (1985) 38 Cal.3d 355, 360-362.

11 The comment to BAJI No. 7.29.50 states: "[W]hether the defendant qualifies as a 'person' appears to be a legal rather than a factual issue, and one that will be resolved by the court."

12 *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 100.

13 *Reich v. Purcell* (1967) 67 Cal.2d 551, 556.

14 *Ibid.*

15 *Kearney, supra,* 39 Cal.4th at p. 119; see also Pen. Code, § 630.

16 Pen. Code, § 630.

17 *Kearney, supra,* 39 Cal.4th at p. 125 (emphasis added.).

18 The fact that the California Legislature purposefully amended the law from one-party consent to all-party consent lends further credence to this premise. (See Assem. Bill No. 860 (1967 Reg. Sess.); see also *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1487.)

19 In amending the Domestic Violence Prevention Act, Family Code section 6200 et seq. (the "DVPA"), the Legislature found and declared that:

> (a) Every person has a right to be safe and free from violence and abuse in his or her home and intimate relationships. (b) Domestic Violence is a pervasive public safety and public health problem that affects people of all income levels, cultures, religions, ages, ethnic backgrounds, sexual orientations, and neighborhoods.

(Stats. 2014, ch. 635, § 1, subds. (a) & (b).) Appellate courts have also consistently recognized that the "protective purpose" of the DVPA is "broad" both in its stated intent and its breath of persons protected, and that it was enacted in response to "increased public concern" regarding domestic abuse. (See, e.g., *N.T. v. H.T.* (2019) 34 Cal.App.5th 595, 602; *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1498; *Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863.)

20 *Hogue v. Hogue* (2017) 16 Cal.App.5th 833.

21 *Marich v. MGM/UA Telecommunications, Inc., supra,* 113 Cal.App.4th at p. 421.

22 *People v. Superior Court of Los Angeles County* (1969) 70 Cal.2d 123, 133 ("Whether in any instance a person possessed the requisite intent is 'a question of fact which may be proved like any other fact, by acts, conduct and circumstances connected with the offense.'").

23 *People v. Gibbons* (1989) 215 Cal.App.3d 1204, 1209.

24 *Ibid.*

25 *Ibid.*

26 *People v. Drennan* (2000) 84 Cal.App.4th 1349, 1351.

27 *Ibid.*

28 *Id.* at p. 1352.

29 *Ibid.*

30 *Ibid.*

31 *Id.* at p. 1357-1359. The *Drennan* court did observe that while a conviction under section 632 was inappropriate, perhaps other statutes, like subdivision (k) of section 647, were violated. (*Id.* at p. 1358.) Subdivision (k) is now found under subdivision (j)(1) of section 647 and makes it a misdemeanor to look through a camera into a room where an occupant has a reasonable expectation of privacy. (See Pen. Code, § 647, subd. (j)(1).)

32 Although the limits and uses of privileges are beyond the scope of this article, a privileged communication is also inadmissible in court. Evidence Code section 917 sets forth several examples of privileged conversations. Generally speaking, a privileged communication must be made in a way that demonstrates it was not intended to be disclosed, otherwise any privilege is waived.

33 *Wilkins v. Nat'l Broadcasting Co., Inc.* (1999) 71 Cal.App.4th 1066, 1080.

34 *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768, 774-775. Prior to *Flanagan*, the California Courts of Appeal were split on the test measuring whether a conversation was confidential. The California Supreme Court in *Flanagan* decided to follow the "*Frio* test" articulated by the appellate court in *Frio, supra,* 203 Cal.App.3d at p. 1490, and overruled the test articulated in *O'Lasky v. Sortino* (1990) 224 Cal.App.3d 241, 248, which held that a conversation was confidential if the party had a reasonable expectation that the content would not later be divulged to a third party.

35 *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 169.

36 *Cuviello v. Feld Entertainment, Inc.* (N.D. Cal. 2015) 304 F.R.D. 585.

37 *Id.* at p. 588.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.* at p. 591.

41 *Safari Club Int'l v. Rudolph* (9th Cir. 2017) 862 F.3d 1113, 1116.

42 *Ibid.*

43 *Id.* at p. 1118.

44 *Id.* at pp. 1123-1126. In another case, where the party asserting the invasion of privacy claim did not take the same precautions, e.g., not engaging in or stopping the conversation when others could overhear it, the federal appellate court held there was no objectively reasonable expectation of privacy. (See *Reynolds v. City & County of San Francisco* (9th Cir. 2014) 576 Fed.Appx. 698, 703.)

45 For example, if the parents are having a loud argument and they are aware that their child may overhear the argument, a recording of the argument by their child may be admissible on the basis that the parents did not have a "reasonable expectation that no one was listening."

46 The exception under section 633.5 applies if:

1. One of the parties to the conversation makes the recording; and
2. The recording is being made with a reasonable belief that evidence is being gathered related to the commission, by the *other* party to the conversation, to the crimes of extortion, kidnapping, bribery, any felony involving violence against another person (e.g., murder, rape, or threats of physical violence), or annoying telephone calls with the intent to annoy under Penal Code section 653m.

47 In 2017, the Legislature augmented section 633.5 to include domestic violence to the list of crimes that are exempt. (Assemb. Bill No. 413, Stats. 2017, ch. 191, § 1, eff. Jan. 1, 2018.) Although limited to the crime of domestic violence, the amendment demonstrates the Legislature's ongoing desire to allow the use of these recordings as evidence against a perpetrator of domestic abuse.

48 See *People v. Parra* (1985) 164 Cal.App.3d 874, 879 (Recording of threats of physical violence by former employee was admissible under section 633.5); see also *People v. Butler* (2018) WL 3342844 at p. 3 (nonpub. opn.) (A secret recording of husband's threat toward wife that she had "one freakin' millisecond before [he] twist[ed] [wife's] head off like a fuckin' chicken in the goddamn field" was admissible under section 633.5.).

49 Pursuant to the Judicial Council's mandatory restraining order forms, i.e., DV-110 and DV-130, both sides in a communication—the victim making the request and the abuser served with the restraining order—have notice that a conversation may be recorded.

50 There is no precedent addressing whether subdivision (b) of section 633.6 may be applied if the victim has not yet, but intends to, file for a restraining order.

51 Present recollection refreshed should not be confused with past recollection recorded. Past recollection recorded occurs when a writing or legal recording is submitted into evidence because the witness cannot provide a first-hand, independent recollection. Present recollection refreshed occurs when a witness uses a writing or recording to refresh his or her memory to provide testimony about a conversation, for which he or she have first-hand knowledge. (See *Frio, supra,* 203 Cal.App.3d at pp. 1491-1493.) Although unlawful recordings under section 632 may be used for present recollection refreshed, they may not be admitted into evidence for past recollection recorded. (*Ibid.*)

52 *Id.* at p. 1492, citing *United States v. Rappy* (2d Cir. 1946) 157 F.2d 964, 967.

53 *Frio, supra,* 203 Cal.App.3d at p. 1495. Although the propounding party cannot submit a transcript of the unlawful recording into evidence, the adverse party may do so. (See Evid. Code, § 771, subd. (b); see also, *In re Berman* (1989) Cal.3d 517, 524-526.)

54 *Frio, supra,* 203 Cal.App.3d at p. 1497.

55 *Ibid.*

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