



## **New Cases in 2020 Affecting Survivors of Domestic Violence**

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**Webinar for the CA Partnership to End Domestic Violence, January 26, 2021**

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## **Technical Difficulties**

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- Audio Difficulties:
  - ▣ Hang up the phone and call back using your initial call in information
- Zoom Program Malfunction
  - ▣ Close down the program and log back on

## Agenda

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- California Courts & the Appeals Process
- Federal Cases – US Supreme Court
- Housing Case
- Restraining Order Cases
- Family Law Cases
- Dependency Cases
- Criminal Law Cases

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## FVAP is

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- A non-profit organization dedicated to providing legal representation and support to domestic violence survivors at the appellate court level.
- Partners with pro bono attorneys from private firms to provide free, high-quality legal representation to low- and moderate-income survivors
- Provides technical assistance to pro bono attorneys, domestic violence advocates on domestic violence issues arising in family law, housing and employment cases

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## What does the trial court do?

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### □ Trial courts:

- Make decisions as to the facts and makes orders on requests based on applying the law (code sections, rules, case law) applies to those facts and issue orders

### □ The trial court judge/commissioner/judge pro tem:

- Holds hearings
- Reviews filings from both sides
- Observes witnesses testifying (credibility)
- Looks at physical evidence (documents etc.)
- Makes findings of fact as to what happened

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## What does the appellate court do? (to review)

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### Appellate courts (“COA”):

Look at happened at the trial court based on the record in the case, apply the law and determine:

- Was there any legal error?
- Was there an “abuse of discretion”?
- Was there prejudice?
- If yes, then the court can reverse/send back

### □ The appellate court

**justices** operate as a panel and generally review only what is in the record of the case, i.e., transcripts, admitted evidence, and court filings.

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## Family Law Appeals in California

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### □ Family law parties in court:

- Are not provided with a lawyer either at the trial or appellate stage
- Are primarily unrepresented and lack the resources to file an appeal

### □ Family law trial court cases are difficult to appeal because:

- Many orders are temporary and not directly appealable
- The case is often continuing while the appeal is in process
- The length of time to get results can mean the results are not as helpful by the time of a decision

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## Why are published appellate cases important?

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- In California, most appellate decisions are **not** published, so cannot be cited in other cases – they apply only to the original parties
- When appellate decisions **are** published, they are part of the body of law that CA attorneys and judges must follow, the decision is case law
- Many appellate decisions interpret statutes and apply law to new situations which gives guidance to trial courts and parties in the future

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## List of Cases

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- Sharp v. Murphy / McGirt v. OK
- Monasky v. Taglieri
- DHI Cherry Glen Association v. Gutierrez
- Nicole G. v. Braithwaite
- McCord v. Smith
- Curcio v. Pels
- Jennifer K. v. Shane K.
- Marriage of Everard
- J.T. v. W.T.
- Marriage of Ankola
- Yost v. Forestiere
- Marriage of Deal
- Marriage of Brewster v. Clevenger
- In re J.M.
- In re I.B.
- Criminal Cases

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## Tribal Jurisdiction & Domestic Violence

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- *Sharp v Murphy* – 140 S.Ct. 2412; See also *McGirt v Oklahoma*, same issue
- HELD: Tribe's interest in protected lands upheld
- Issue: What is physical boundary of tribal court jurisdiction in OK where subsequent events encroached on tribal lands ceded to Creek Nation by Congress in 1833 treaty between US & Creeks?
- Current rates of violence against Native Women constitute crisis; Congress responded by restoring tribal jurisdiction over non-Indian perpetrated DV in "Indian Country" in VAWA

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## Tribal Jurisdiction & Domestic Violence

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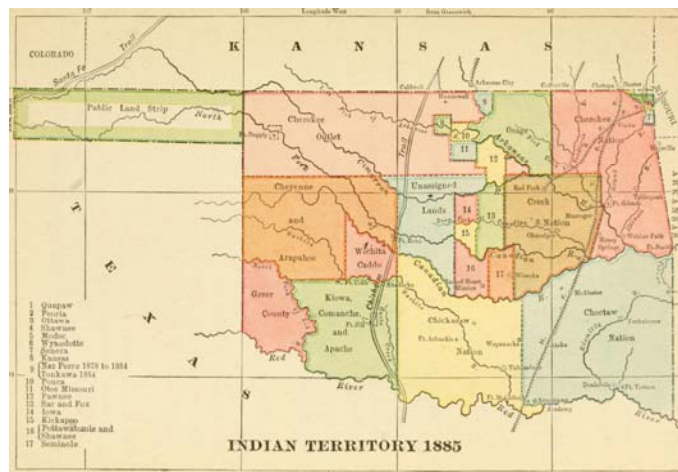
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- *Sharp v Murphy*, continued:
- In *McGirt* and *Sharp* OK argued boundaries of Indian Country should be severely limited based on actions of Federal & State governments which violated Treaty & rights of Native Americans.
- If OK succeeded, Creek Nation would have lost ability to prosecute non-Indians for DV & other serious crimes committed on vast majority of their tribal territory.

## Tribal Jurisdiction & Domestic Violence

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- *Sharp v Murphy*, continued:
- Court held for tribe: although “Congress has since broken more than a few promises to the Tribe” and “intruded on the Creek’s promised right to self-governance” in many ways, those actions did not abolish tribal interest in the contested lands



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## Domestic Violence & Int'l Child Custody

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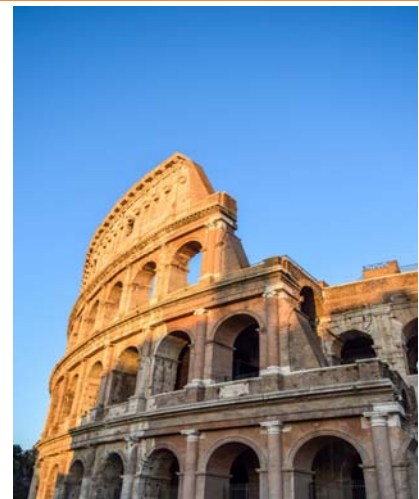
- *Monasky v Taglieri*, 140 S.Ct. 719, Ohio, Hague Convention on International Aspects of Child Abduction
- HELD: Upheld order to return child to Italy, custody to father
- US citizen mother gave birth in Italy, took baby to DV shelter, brought 2-month old baby to US to escape DV from Italian father
- Father filed in US court, court ordered child returned to him, as Italy was child's "country of habitual residence"
- Mother argued no intent to move to Italy permanently, child would be harmed psychologically if separated from her

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## Domestic Violence & Int'l Child Custody

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- *Monasky*, cont. US Supreme Court unanimously held parents' shared intent was to reside in Italy based on totality of circumstances; no grave risk to child if returned to father, since he had not directly abused child; psychological harm from separation from mother irrelevant
- US S.Ct. says Italian court should fully explore DV allegations in custody determination (opinion by RBG)
- Child, 2 years old, returned to father in Italy; mother has remote visitation



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## Eviction and VAWA Notice

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- *DHI Cherry Glen Assoc. v Gutierrez*, 46 Cal.App.5th Supp. 1, Yolo County
- HELD: Reversed eviction because no notice under VAWA
- DV survivor with §8 housing voucher lost job because she had to go to court to get DVRO & custody – (Note: this appears to violate Labor Code section 230(c))
- She could not pay rent on time, served with unlawful detainer notice; she said she offered rent late but manager would not accept it

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## Eviction and VAWA Notice

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- *DHI* cont. - Trial court ordered eviction over survivor's objection, SOD stated no VAWA notice required because notice to pay rent, not DV related
- Superior court's appellate division reversed: VAWA notice on all eviction papers is mandatory; DV survivor not given this notice (LSNC rep client)
- Ca Supreme Court ordered case published, rare action



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## Coercive Control is Domestic Violence

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- McCord v Smith, 51 Cal.App.5th 358, Orange County
- HELD: Coercive control as basis for DVRO
- Ex-boyfriend repeatedly texted, called, threatened, showed up at ex-girlfriend's home and work uninvited, sent copy of her RN license to her, trying to get her to speak to him



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## Coercive Control is Domestic Violence

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- *McCord v Smith*, cont.
- Trial court properly found McCord's acts were means to exercise "control and dominion" over Smith
- Trial court properly found those acts disturbed Smith's peace, as well as harassing her, threatening, stalking, all of which = abuse for purposes of DVRO
- Appellate court also noted courts should use "totality of the circumstances" analysis in issuing DVRO's, looking at whole history
- FVAP obtained publication, sent a Case Alert

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## DVROs and Move Out Orders

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- *Nicole G v Brathwaite*, 49 Cal.App.5th 990, Los Angeles
- HELD: Temporary possession of joint residence in DVRO properly ordered
- Abusive boyfriend forced girlfriend to sign over half interest in residence; she complied out of fear
- Both filed for DVROs; his was denied; hers was granted
- Court: boyfriend “established & maintained control” over her
- He appealed order that he move out, arguing she had already left & they should deal with this in separate civil case re title to home

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## DVROs and Move Out Orders

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- *Nicole G v Brathwaite*, cont.,
- Court of appeal found for girlfriend
- Temporary exclusive use and possession of joint residence properly ordered in DVRO even though she had temporarily moved out due to abuse
- FVAP obtained publication, sent Case Alert re how to use case



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## Social Media Postings and DV

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- *Curcio v. Pels*, 47 Cal.App.5th 1, Los Angeles
- HELD: DVRO Reversed-TRO does not create presumption of abuse which shifts burden of proof to other side; one private Facebook post here not enough; evidence of abuse by petitioner admissible; no basis to extend length of DVRO
- Former girlfriends, both comics, Curcio filed for DVRO alleging abuse by Pels



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## Social Media Postings and DV

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- *Curcio* cont.- Pels posted one private Facebook message on her account alleging abuse by Curcio, not sent to Curcio, not public, Curcio alleged Pels struck her with blow to the head
- Trial court ruling: TRO created a rebuttable presumption of DV; Curcio met burden on a preliminary basis because TRO granted; could not hear evidence of abuse by Curcio; extended DVRO from 2-3 years because believed Pels didn't "take responsibility"; ordered both parties to stay away from each other
- Lots of problematic issues with opinion including what areas of the DVPA cover a blow to head, mixing in renewal language

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## Evidence and Bias in DVRO case

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- *Jennifer K. v. Shane K.*, 47 Cal.App.5th 558, San Francisco
- HELD: DVRO Denial Affirmed- Petitioner did not show that acts were abuse, judge's questions and comments did not show high probability of gender bias
- Former Dating partners with child in common, Jennifer filed DVRO based on past incident of sexual abuse and physical abuse



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## Evidence and Bias in DVRO case

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- *Jennifer K.*, cont.- Petitioner didn't show punch was "an intentional or reckless act that cause[d] or attempt[ed] to cause bodily injury" or "place[d] [petitioner] in reasonable apprehension of imminent serious bodily injury"
- Found former boyfriend's act in punching refrigerator did not warrant DVRO as it was done in frustration, not with intent to injure petitioner
- Judges comments about clothing, demeanor not sufficient to show gender bias

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## Continuances in for DVRO hearings

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- *J.M. v W.T.*, 46 Cal.App.5th 1136, Los Angeles
- HELD: Reversed DVRO Dismissal, Petitioner had shown good cause for a continuance.
- J.M. requested DVRO in 1/2019 alleging multiple incidents of abuse, that took place in late 2017/early 2018
- J.M. asked for continuance 5 days before hearing, required surgery & hadn't been able to serve W.T.



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## Continuances in for DVRO hearings

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- *J.M. cont.* – Trial court held hearing anyway; dismissed DVRO & said it was with prejudice because last incident was 10 months ago
- Cannot deny DVRO based only on length of time since last incident
- J.M. properly timely filed request for continuance; showed good cause
- Legislature expressly gave courts authority to continue based on lack of service; intent to broaden grounds for continuance by allowing either party based on good cause

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## DVROs, Fee Award and Proof for Nullity

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- *Marriage of Ankola*, 53 Cal.App.5th 369, Santa Clara County Continuation of events from prior cases
- Held: Affirmed grant of DVRO, denial of nullity and reversed on prevailing party fees; husbands acts stalking, green card did not go to essence of marriage; court cannot change fee award
- Husband filed for nullity which was denied
- Wife requested DVRO which was denied, she requested a DVRO again and it was granted with fees
- Husband requested DVRO granted with fees



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## DVROs, Fee Award and Proof for Nullity

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- *Ankola* cont. Properly found husband moving into apartment was stalking and he lied about his knowledge and reasons for moving in next to her
- Can't reconsider Husband's attorney fees order even though Wife now had order for more \$
- Properly found Wife's immigration status may have had an indeterminate role was not enough to establish fraud as to the essence of the marital relation



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## Changing Terms of Civil Harassment RO

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- *Yost v. Forestiere*, 51 Cal.App.5th 509, Fresno County (partial pub)
- HELD: Denial Reversed; Courts should evaluate change based on reasonably probability it will happen again, including the circumstances at the time and currently.
- Yost was the mother of Forestiere's granddaughter, had a 3 yr. CHRO against him in 2015 protecting her & child based on risk of kidnapping



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## Changing Terms of Civil Harassment RO

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- *Yost*, cont. Grandfather filed to modify CHRO to allow contact with child, after father had custody plan leading to joint custody.
- Trial court: Denied request; change in custody order not relevant to request for change to CHRO
- Appellate court: Courts have discretion to modify CHROs based on a material change in facts, change in law, or ends of justice
- Court can modify order for particular form of harassment if no reasonable probability it will happen again
- Burden on is on restrained party it wont happen, preponderance

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## Litigation Abuse – Vexatious Litigant

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- *In re Marriage of Deal*, 45 Cal.App.5th 615, Alameda County
- HELD: abusive ex-husband properly declared vexatious litigant
- Ex-wife requested finding that abusive ex-husband was vexatious litigant based on divorce litigation & two separate civil actions he filed against her
- Trial court granted: he needs court permission before filing any litigation on his own; also ordered to pay wife's attorney fees in civil actions

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## Litigation Abuse – Vexatious Litigant

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- *Deal* cont. – Upheld finding based on substantial evidence
- In husband's appeal (no attorney), he made death threats against several judges and lawyers and their families
- Appellate court upheld vexatious litigant finding based on substantial evidence, noted it would order sanctions if husband did not stop abusing court process; ordered him to pay wife's attorney fees for appeal



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## DV and Denial of Spousal Support

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- *In re Marriage of Brewster & Clevenger*, 45 Cal.App.5th 481, Monterey
- HELD: Affirmed; Clevenger with DV conviction triggered presumption against support, Clevenger did not overcome presumption with “documented evidence” or prove Brewster had committed DV
- Dissolution of long term marriage; Clevenger convicted of misdemeanors for stalking, vandalism and unauthorized entry against Brewster



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## DV and Denial of Spousal Support

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- *Brewster* cont.,- trial court admitted evidence of convictions and found it triggered the rebuttable presumption against spousal support
- Clevenger tried to rebut presumption; had to show “documented evidence” she was victim of DV, using 3 separate incidents
- Appellate court held “documented evidence” means the convicted spouse must present written evidence in the form of a “writing” within the meaning of EC 250 by a preponderance his or her history as a victim of domestic violence in the relationship

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## Separation from Abuse & Reunification

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- *In re J.M.*, 50 Cal.App.5th 833, San Diego
- HELD: Reversed Termination Evidence that it took a parent time to break free of abuse, stay away from abusive parent, and go through services does not overcome presumption in favor of reunification; Child ordered returned
- Child removed from survivor because of other parent's DV; ordered to therapy, get stable employment and housing, got a restraining order



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## Separation from Abuse & Reunification

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- *J.M.*, cont. -Survivor followed reunification plan for but still saw the abusive parent and did not follow order to get psychological evaluation; so services were terminated
- At the time of termination hearing, survivor had stayed away from other parent for a year, and had strong relationship w/ child
- The fact that she did not “immediately break free” does not make it in best interest to deny mother
- Cannot ask her to prove an above average level of parenting
- FVAP requested publication, Case Alert available

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## Journey to Separation & Reunification

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- *In re I.B.*, 53 Cal.App.5th 133 , Orange County
- HELD: Affirmed- Trial Court properly credited Mother's efforts at separation and granted reunification
- Mother is legally blind and has a mild cognitive disability
- In 2017, Mother was not live with Father due to DV, but believed she needed Father because of disability; children were removed; unsanitary living conditions and domestic violence
- Mother completed plans but struggled with staying away from Father and getting a restraining order



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## Journey to Separation & Reunification

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- Eventually, Mother was no longer living with father, had learned Braille, insight into the abuse, attended programming, was working, more independent and was spending long periods of time with the children
- Mother's conduct while under the control of an abusive spouse should not be held against her indefinitely
- Court questioned the wisdom of ordering joint therapy as a requirement for reunification
- "taking legal action is not always a good measure of success because "the legal system frequently provides an incomplete remedy to the violence" due to the "limited types of relief available, the short duration of court orders, and the challenges of the courtroom atmosphere"

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## Statements to Others as Evidence of DV

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- *People v Quintanilla*, 45 Cal.App.5th 1039, Riverside County
- HELD: Out of court statements wrongly admitted under Evidence Code 1390
- Defendant shot, killed cohabitant girlfriend in presence of her 4-year-old daughter
- Victim's statements to friends, relatives re prior DV admitted at trial; court also admitted testimony of prior girlfriend re DV by defendant (Evidence Code § 1109)



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## Statements of Others as Evidence of DV

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- *Quintanilla* cont.- Conviction for 1st degree murder reversed
  - ▣ No showing that defendant killed victim to keep her from testifying
  - ▣ No pending legal case
  - ▣ No evidence he threatened her if she went to authorities
  - ▣ Many of her statements were hearsay
  - ▣ But her spontaneous statements were admissible, as was testimony from witnesses re seeing injuries on victim, child's testimony re shooting, and prior girlfriend's testimony re DV (Evid Code 1109), so if case is retried, he could still be convicted

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## Evidence of DV Where Recantation

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- *People v Liggins*, 53 Cal.App.5th 55, San Francisco
- HELD: Evidence wrongly admitted in probation revocation hearing
- Defendant convicted of injuring ex-girlfriend, given probation
- He injured her again, DA filed to revoke probation
- At revocation hearing, victim had recanted; her out of court spontaneous statements to police about DV admitted; probation revoked



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## Evidence of DV Where Recantation

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- *Liggins* cont. – Reversed Probation Revocation
- Victim's statements testimonial because made to police & no ongoing emergency
- Must show victim unavailable or good cause to admit hearsay in lieu of live testimony BEFORE admitting victim's statements even though spontaneous, excited utterances
- Violation of 6th Amendment right of confrontation

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## U Visa Application as Evidence

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- *People v. Villa*, 55 Cal.App.5th 1042, Riverside County
- HELD: Affirmed- evidence was relevant but trial court was ok to keep out evidence where girlfriend didn't know before reporting and testifying and evidence of physical violence was overwhelming
- Villa was with his girlfriend and child when he began physically abusing her; Villa pulled over for red light
- Girlfriend later said that Villa had beaten her with a belt buckle and threatened to deport her if she reported the abuse



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## U Visa Application as Evidence

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- *Villa cont.*, - Villa charged and convicted with inflicting corporal injury and other charges; he appealed based on exclusion of U Visa evidence at criminal trial
- At trial, Defense counsel asked to x-examine victim, trial court held a special hearing away from jury to decide
- Trial court found it relevant for potential motive but found it more prejudicial where it had testimony the girlfriend didn't know about it until she moved to a domestic violence shelter after she had already reported the violence

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## Threats to Family Law Attorneys

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- *People v Roles*, 44 Cal.App.5th 935, Butte County
- HELD: Criminal threats affirmed but not as separate counts
- Defendant and wife in divorce, custody, DVRO family law case; he had sole custody until child's attorney recommended joint custody & court agreed
- Defendant texted and called wife's and child's attorneys, harassing & threatening them; court gave sole custody to wife; supervised visits for husband; he continued to harass attorneys and made many death threats, including to kill wife

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## Threats to Family Law Attorneys

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- *Roles*, cont.
- Appellate court reversed 8 convictions for criminal threats, no evidence that he intended child's attorney to convey threat to wife's attorney when he left voicemails, and child's attorney listened to 15 voicemails at same time
- Convictions for stalking & criminal threats affirmed, but punishment for these should not be separate as they were part of one course of conduct

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## QUESTIONS?

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## Thank You!

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\*\*Please note that FVAP's physical office is closed for now and all staff are working remotely

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