



AB 2369 & DVPA Attorney's Fees

**Presented by Cory Hernandez, Esq.,
Staff Attorney, Family Violence Appellate Project,
with Legal Aid Association of California,
on March 16, 2023 (live recording)**

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Ask me questions at any time or wait until the end, or email me or FVAP afterward.

FVAP's Work

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- CA & WA nonprofit
- Ensure the safety and well-being of survivors of domestic violence and other forms of intimate partner, family, and gender-based abuse
- Help survivors obtain effective, free appellate representation, collaborating with pro bono attorneys
- Advocate for survivors on important legal issues
- Offer free training and legal support for those helping survivors

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FVAP's work contributes to a growing body of case law that provides the safeguards necessary for survivors of abuse and their children to obtain relief from abuse through the courts

Notes

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- AB = Assembly Bill
- CCP = Code of Civil Procedure
- FC = Family Code
- DVRO = domestic violence restraining order
- DVPA = Domestic Violence Prevention Act (FC 6200 et seq.)
- CRC = California Rules of Court
- “Section” and “rule” may be omitted from statutory and rule citations, respectively



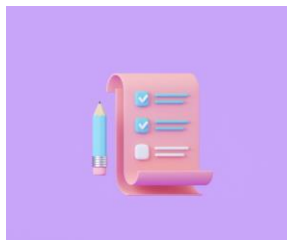
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DVROs are issued under the DVPA (FC 6200 et seq.).

Agenda

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- Learning goals
- Bill history
- Statutory changes
- Request procedures
- Ability to pay
- Fees amount
- Specific cases
 - ▣ Partial win
 - ▣ Respondents
 - ▣ Mutual
 - ▣ Modification or termination
- Potential issues for appeal
- Questions

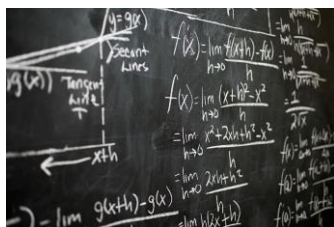


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Learning Goals

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- Understand the intent behind the bill
- Know the fees request process and requirements for each party
- Recognize how the amended law works in specific cases
- Anticipate potential issues for appeal



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See also FVAP’s free recorded trainings—most of which have MCLE credit available—including on how to lay a record for appeal, statements of decision, and general DVRO/DVPA trainings: <https://fvaplaw.org/training-videos/>

LAAC also has recorded trainings on their website.

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AB 2369's History



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Stats. 2022, ch. 591, eff. January 1, 2023. Find online here:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB236
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Before 1/1/23 (pre-AB 2369): FC 6344

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- Two subdivisions (a) and (b)
- Subdivision (a) = “prevailing party”
 - Discretionary
 - Ability to pay (FC 270)
- Subdivision (b) = prevailing petitioner who “cannot afford to pay”
 - Mandatory, if:
 - Petitioner “cannot afford to pay”
 - Fees are “appropriate” based on “respective incomes and needs” and “any factors affecting the parties’ respective abilities to pay”

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Old statute:

https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2369&showamends=true

Fifth-eighth points: Subdivision (b) added to statute in 2005 – unclear from legislative history exactly why that was added or how it was supposed to work. No published decision has dealt with subd. (b).

Problem for Petitioners

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- Courts collapsed subdivisions (a) and (b)
 - ▣ Petitioners had to prove more than respondents
- Courts denied fees to prevailing petitioners for lack of “need”



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See our new law alert with a chart detailing these statutory provisions:
<https://fvaplaw.org/attorneys-fees-in-dvro-cases/>

Last point: Some courts would say the petitioner could afford the attorney in the first place, so doesn't need fees—even if the survivor only got the attorney for a limited scope, or only afforded them because they went into debt or borrowed heavily from family/friends.

Intent of AB 2369

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- Make it easier for petitioners-survivors
- Make it harder for respondents-abusers
- Deter frivolous or abusive requests
 - ▣ Cross-requests, retaliatory requests for DVRO
 - ▣ Requests to modify/terminate DVRO early
- Match other remedial statutes, like Fair Employment & Housing Act (FEHA), anti-Strategic Lawsuit Against Public Participation (anti-SLAPP), and Political Reform Act.



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Committee analyses of AB 2369 can be useful for legislative intent:

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB2369

Some letters of support can be found on FVAP's website:

<https://fvaplaw.org/attorneys-fees-in-dvro-cases/>

Last point: Three statutory schemes can serve as examples, in addition to others: (1) Fair Employment and Housing Act (FEHA); [Gov. Code, § 12965, subd. \(b\)](#)): e.g., *Patterson v. Superior Court* (2010) 70 Cal.App.5th 473, 487; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 583; *Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F.3d 607, 612. (2) Anti-SLAPP statute ([Code Civ. Proc., § 425.16, subd. \(c\)\(1\)](#)): e.g., *Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 604-606; *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 879; *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 486; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 627, fn. 19; *Graham-Sult v. Clainos* (9th Cir. 2014) 756 F.3d 724, 752. (3) Political Reform Act of 1974 ([Gov. Code, § 81000 et seq.](#)): e.g., *Travis v. Brand* (Jan. 30, 2023, S268480) ____ Cal.5th ____.

AB 2369's Changes to FC 6344

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- Three subdivisions (a), (b), and (c)
- Subdivision (a) = “prevailing petitioner”
 - Mandatory
- Subdivision (b) = “prevailing respondent”
 - Discretionary, if:
 - Petition is “frivolous” OR
 - Petition is “solely intended to” do one of these:
 - “Abuse”
 - “Intimidate”
 - “Cause unnecessary delay”



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Fourth-tenth points: I may refer to these subdivision (b) requirements in the fourth point as the “6344(b) elements.”

We’ll get to subd. (c) later.

After 1/1/23 (post-AB 2369): Easier for Petitioners

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- No more ambiguity between subdivisions (a) and (b)
- No need to show “need” for fees
- No longer need to file Income & Expense Declaration (FL-150), except . . .



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Judicial Council is amending their forms to implement this change in law, including removing the I&E requirement for petitioners and adding language about what respondents need to prove to get their own fees.

DVPA & Other Attorney's Fees

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- If you want fees under the DVPA and another statute, you may need to file an I&E for that other statute.
- Different statutes have different requirements.



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Both points: e.g., *C.T. v. K.W.* (2021) 71 Cal.App.5th 679; *Darab Cody N. v. Olivera* (2019) 31 Cal.App.5th 1134.

FVAP has a case-annotated compendium (case law compendium) that includes all published DVPA cases, including those on FC 6344. This and other resources are available for free on our website: <https://fvaplaw.org/legal-resource-library/>

Other Notable Changes

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- Subdivision (c) = Ability to pay (FC 270)
- Subdivisions (a) & (b): “Upon request” =
 - ▣ No sua sponte orders
 - ▣ Oral request should be sufficient



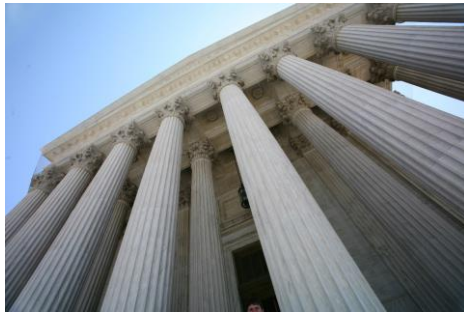
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First point: Need to expressly reference FC 270 because some courts not considering that under prior law, even though it was always required.

Third point: Important because not want courts to take away survivor autonomy, or independently find a denied request was frivolous.

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Requesting DVPA Fees



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AB 2369's Applicability

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- Your case was decided before 1/1/23 but your fees request is being heard after 1/1/23, does AB 2369 apply?
 - ▣ Yes, it should.
- FC 6344 also applies to appeals.



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First two points: Generally, amendments to remedial or procedural statutes apply to actions when the new statute becomes effective. (FC 4; *City of Clovis v. County of Fresno* (2014) 222 Cal.App.4th 1469, 1483-1485.)

Third point: applies to appeals: *Nicole G. v. Braithwaite* (2020) 49 Cal.App.5th 990, 1001.

Examples: end DVRO early (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1508-1509); use FC 6344 as sanction (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 38).

Request Procedures

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- Make the request
 - ▣ Judicial Council forms (DV-100, DV-120)
 - ▣ Another written request (FL-300)
 - ▣ Oral request
 - ▣ Deadline = appeal deadline (CRC 3.1792)
- Give notice
- Have a hearing



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First-fifth points: Request does not need to be made on the DV forms: *Faton v. Ahmedo* (2015) 236 Cal.App.4th 1160, 1169-1173.

Second-third points: Judicial Council forms can be found [online here](https://www.courts.ca.gov/forms.htm):
<https://www.courts.ca.gov/forms.htm>

Last point: The court could decide your fees request when it decides the DVRO, or after, depending on the request timing and the court's calendar.

Look also to your local rules of court.

Ability to Pay

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- Discretionary determination
- Can look at actual income, debt, property and assets owned, obligations to be met, ability to earn, recent sales, etc.
- Can base on testimony of one party or witness
- Can presume party will work or be self-employed to cover basic living expenses
- Caution: using FC 270 case law



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First point: *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1509; *Blank v. Blank* (1933) 129 Cal.App. 403, 406-407.

Second point: *Alcalay v. Alcalay* (1962) 200 Cal.App.2d 820, 823; *Kadello v. Kadello* (1934) 220 Cal. 1, 3.

Third point: *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614, citation omitted; *In re Marriage of F.M. & M.M.* (2021) 65 Cal.App.5th 106, 119, citing *In re Marriage of In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 703; *Application of Sigesmund* (1961) 193 Cal.App.2d 219, 224.

Fourth point: *In re Schleich* (2017) 8 Cal.App.5th 267, 293.

Fifth point: Note that [Family Code section 270](#) cases are useful *only to a point*—for establishing the ordered-to-pay party’s ability to pay, or likelihood thereof. But [section 270](#) cases are limited in providing guidance because they often also discuss *other* Family Code statutes governing attorney’s fees (e.g., FC 2030, 7605), which require the court to consider the needs and ability to pay *of the party asking for and being awarded fees*, unlike [Family Code section 6344](#).

Fees Amount

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- Discretionary amount
- Can consider:
 - Rules of Professional Conduct on fee agreements
 - Nature, difficulty, and amount of litigation
 - Skill and training required and employed to try case
 - Success gained
 - Experience, age, and education of attorney
 - Intricacies and importance of litigation
 - Time consumed



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First point: *Faton v. Ahmedo* (2015) 236 Cal.App.4th 1160, 1173; *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1509.

Second point: *In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296-297

Specific Cases

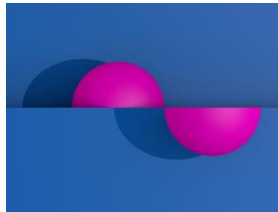


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Partial Win I

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- Broad interpretation to award fees if partially successful
 - ▣ Grant DVRO (no-contact, no-abuse, stay-away) but deny other relief, e.g., financial or property
 - ▣ Find abuse happened, but deny DVRO
 - ▣ Deny a DVRO, but grant other relief (e.g., support)



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First point: *Mann v. Quality Old Time Services* (2006) 139 Cal.App.4th 328, 338-340 (anti-SLAPP).

Third point: *In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1499 fn. 8.

Fourth point: *In re Marriage of J.Q. & T.B.* (2014) 223 Cal.App.4th 687, 701-704 (spousal support per FC 6341).

Partial Win II

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- Maybe ask: Were the results “so insignificant that your client did not achieve any practical benefit from bringing the [request]”?
- Fees may be reduced to match amount of success



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First point: *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 782. Note there are different ways to articulate the “prevailing party” standard. CCP 1032, subd. (a)(4) also has a definition. If they get some practical benefit, they should be prevailing, even in part.

Second point: *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.

If an issue is effectively denied because it's not litigated/argued, no attorney time was spent on that, so fees shouldn't be reduced.

Just like dividing up time between statutes, if seeking DVPA and other fees, divide up attorney time between issues where you're successful, and where you're not

Respondent I

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- Total win = No DVRO, no abuse finding, no other relief granted
- May get fees if meet FC 6344(b) elements by preponderance of evidence
- “Frivolous” = objective, “reasonable attorney”
 - “Totally and completely without merit or for the sole purpose of harassing an opposing party”
 - “Groundless,” “unreasonable,” “vexatious”



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Third point: *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 683-684; *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199.

Fourth point: CCP 128.5, subd. (b)(2). This statute is cited *only* for defining “frivolous”; the other procedural or substantive requirements in this statute generally *should not* apply to attorney’s fees in DVRO cases. For a case using a similar definition, see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.

Fifth point: *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421-422; see also CCP 391 et seq.

Respondent II

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- “Solely intended . . .” = subjective, can infer from circumstances
 - ▣ “Abuse” = FC 6203, 6320
 - ▣ “Intimidate, or cause unnecessary delay” = plain language



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First point: *Jones v. Goodman* (2020) 57 Cal.App.5th 521, 533-540 (discusses differences between objective and subjective standards; compares “frivolous” to “bad faith” in a statutory scheme).

Mutual DVROs

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	Opposing Party (OP) Wins	OP Loses
Your Client (YC) Wins	<p>YC and OP are both “prevailing” petitioners and should get fees <i>for winning their own cases</i>.</p> <p>If YC and OP <i>partially win</i>—e.g., the court finds both parties abused each other but issues neither a DVRO, or the court grants each some but not all requested relief—both are arguably “prevailing” petitioners in their own cases and should get fees, but maybe at lesser amounts.</p>	<p>YC would get fees for “prevailing” as the petitioner <i>in YC’s DVRO case</i>.</p> <p>The court may grant YC fees for <i>defeating OP’s DVRO request</i>, if the FC 6344(b) elements are met.</p>
YC Loses	<p>OP would get fees for “prevailing” as the petitioner <i>in OP’s DVRO case</i>.</p> <p>The court may grant OP fees for <i>defeating YC’s DVRO request</i>, if the FC 6344(b) elements are met.</p>	<p>YC and OP are both arguably “prevailing” respondents, so the court may grant each party fees <i>for defeating the other’s request</i>, if the FC 6344(b) elements are met.</p>

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As with seeking fees under DVPA and other statutes, and with partially successful parties, here you may need to divide your attorney time between different cases/issues.

Mutual DVROs are governed by FC 6305. (Top left corner.) See FVAP’s case-annotated compendium for published cases interpreting FC 6305: <https://fvaplaw.org/self-help-legal-tools/>

This chart is also available on our new law alert for AB 2369, which also has a chart explaining how AB 2369 generally changed FC 6344 for petitioners and respondents in unilateral-request cases: <https://fvaplaw.org/attorneys-fees-in-dvro-cases/>

Modification or Termination

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- “Petitioner” = “protected party”
- “Respondent” = “restrained party”
- If a protected party defeats a restrained party’s request to *modify* or *terminate* their DVRO, they should be considered “a prevailing petitioner”
- If a restrained party successfully modifies or terminates a DVRO, they should be considered “a prevailing respondent”

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Note there are few modification or termination request forms for DV (as of yet); just the DV-400-INFO and DV-400. You have to use FL-300 to make the request, and the modified DVRO would be on DV-130. See DV-400-INFO for more information. The DV-400 form is just for the court to make findings to terminate a DVRO.

Third point: See, e.g., *Loeffler v. Medina*, *supra*.

Potential Issues for Appeal



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Potential Issues for Amended FC 6344

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- Who is “prevailing” if the petitioner wins in part?
- Who is “prevailing” in a modification or termination request?
- How does FC 270 (ability to pay) interact with FC 6344?
- Does AB 2369 apply to a pending fees request, when the DVRO was decided pre-1/1/23?
- Have the FC 6344(b) elements been met?
 - ▣ If so, what is the scope of the court’s discretion to deny fees?



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By appeal or further legislative action.

First point: See slides on partial wins.

Second point: See a couple slides ago.

Third point: See slide on ability to pay.

Fourth point: See slide on applicability.

Fifth point: See slides on respondents.

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Questions?



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Thank You!

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