Model Memorandum of Points and Authorities in Support of Allowing Petitioner to Present New, Relevant Evidence at Trial

Instruction Sheet

This model Memorandum of Points and Authorities (MPA) can be used by the petitioner in a domestic violence restraining order case who wants to be able to present evidence not included in the DV-100 declaration. The MPA argues that petitioners do not need to include every piece of evidence in their declaration to be able to present that evidence at trial. Some evidence might not be available at the time that they are filing their DV-100 petitions, including, but not limited to, violations of the temporary restraining order. Even if evidence was available at the time that the petitioner filled out the DV-100 form, that does not mean that the petitioner should not be allowed to present it if it is relevant to the case.

To use this MPA, simply fill in the information highlighted in yellow to tailor it to the individual case. This primarily consists of the parties' information and case information, and the various dates of hearings that have been scheduled and continued. The petitioner should also make sure that what it says actually applies to her/his situation, and can make changes where necessary.

Once the information has been filled in for the individual, file it with the court to request that the petitioner be allowed to present new evidence during the restraining order hearing.

Tips:

- To mitigate this issue, include as many instances of abuse as possible in the petitioner's declaration. If there is another incident that occurs after the declaration is filed, or if there is another incident that the petitioner remembers, try to file a supplemental declaration.
- Make sure petitioner reads through this document and is prepared to answer questions about it. Petitioner should be able to talk about why presenting new evidence is not harming Respondent in any way, and that the Respondent had plenty of time to prepare for the hearing and to discuss the incidents and patterns of abuse.
- Write in the initial declaration the following sentence, or something similar:
  At the hearing, petitioner will be able to testify to facts that present the generally abusive, controlling and coercive nature of the respondent's behavior; this may include other acts that constitute abuse under the DVPA.

For questions, contact Eliza Duggan at eduggan@fvaplaw.org or call the office.

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Petitioner: _____
Address line 1
Address line 2
Phone: _____
email: _____

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF _____

_____ Petitioner-Plaintiff, v. _____ Respondent-Defendant	MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT OF ALLOWING PETITIONER TO PRESENT NEW, RELEVANT EVIDENCE AT TRIAL CASE NUMBER: _____

I. Introduction

Petitioner filed a DV-100 request for a temporary restraining order on (date), which was granted on (date) and a hearing for a long-term domestic violence restraining order is set to be held on (date). On (date), Respondent was served with a copy of the request, the order, and the notice of hearing. / Petitioner is still attempting to serve the Respondent with a copy of the request, the order, and the notice of the hearing. Petitioner included a declaration written under penalty of perjury that outlined all of the relevant instances of abuse that had occurred at the time that she/he/they made the request. However, Petitioner may have additional evidence to present at the hearing, in particular if Respondent commits any other acts of abuse or commits any violations of the temporary restraining order (after Respondent is served [*if Respondent has not yet been served*]). Petitioner may also want to include other prior instances of abuse that he/she/they did not previously recall, or additional evidence he/she/they may obtain to support her allegations of abuse.

Petitioner therefore requests that the court allow him/her/them to present evidence at the hearing on his/her/their request for a long-term domestic violence restraining order. Petitioner would also request that if the restraining order is granted, that the court enter it for a period of (five) years.

II. Argument

A. The Right to Present Relevant and Competent Evidence on a Material Issue Is an Essential Element of a Fair Trial.

Domestic Violence Prevention Act restraining order hearings are proceedings under the Family Code, and as such they are governed by the rules of practice and procedure of general civil litigation. (Fam. Code, §§ 210, 6218.) The Evidence Code provides that all relevant evidence is admissible absent statutory exceptions. (Evid. Code, §§ 210, 351.)

The courts of this state have articulated that "the right to offer relevant and competent evidence on a material issue" is an important element of a fair trial. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1356–57.) To that end, California courts have found that it is reversible error not to allow parties to present relevant, admissible evidence in family court proceedings. (*Elkins*, *supra*, 41 Cal.4th at pp. 1356-57 [holding that a local rule that all family law matters had to be presented via written declaration violated hearsay and various statutory provisions]; *Caldwell v. Caldwell* (1962) 204 Cal.App.2d 819, 821 [trial judge's refusal to hear plaintiff wife's testimony as to child's needs in a child support modification hearing was reversible error per se]; see also *Noergaard v. Noergaard* (2015) 244 Cal.App.4th 76, 87 ["Due process required the trial court to decide the material issue of father's alleged death threats and to afford mother the opportunity to offer relevant and competent evidence on that issue."].)

Domestic relations litigation has been described as "one of the most important and sensitive tasks a judge faces," and as such, "speed is not always compatible with justice." (*In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422.) In domestic violence proceedings, the stakes are often even higher than in ordinary family law matters. Thus, as trial courts evaluate restraining order requests, as with other family law matters, they must consider "the obligation of the courts to give full and careful consideration to the issues presented" and "the right of parties to adequately prepare and present their cases to the courts." (*Elkins*, *supra*, at p. 1354 [citing *Garcia v. McCutchen* (1997) 16

Cal.4th 469, 480].) Though it may be faster to base the hearing primarily on declarations and to encourage parties to be inclusive in their pleadings, it would be a disservice to parties and to the court not to allow the parties to testify and submit additional evidence at the hearing.

Should Petitioner want to present additional evidence at the hearing, it will likely come at least in part in the form of oral testimony. The Family Code provides that "absent a stipulation of the parties or a finding of good cause" in a domestic violence restraining order hearing, "the court *shall* receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties." (Fam. Code, § 217, subd. (a) [emphasis added].) The California Supreme Court has expressed that "the oral testimony of witnesses supplies valuable evidence relevant to credibility, a critical issue in many marital dissolution trials." (*Elkins*, *supra*, at p. 1356.) This is particularly salient in domestic violence cases, since the "testimony of one witness, even that of a party, may constitute substantial evidence" to support a finding of abuse and the issuance of a restraining order. (*In re Marriage of Fregoso and Hernandez* (2016) 5 Cal.App.5th 698, 703.)

Thus, if Petitioner has any relevant and material evidence that will help the court to make the decision on whether to issue the long-term domestic violence restraining order protecting her/him/them from Respondent, the court should allow her/him/them to do so, even if that evidence was not contained in her/his/their declaration. This will ensure that Petitioner's rights to a fair trial are protected and the court has access to the most comprehensive information with which to make the decision on whether to issue the restraining order.

B. **Whether or Not Petitioner Submitted a Particular Piece of Evidence with the Restraining Order Application Has No Bearing on Whether It Is Admissible at the Restraining Order Hearing.**

When a Petitioner submits an application for a domestic violence restraining order, they must set forth all of the relief requested on the DV-100 form. In the supporting declaration, evidentiary facts in support of each requested order must be included at item 25 on the DV-100 Request, and at item 10 or by attached declaration. However, there is no requirement that the Petitioner include *all* of the admissible evidence that is possibly relevant to the request for a long-term restraining order. Instead, the Petitioner need only write a "facially sufficient" petition to demonstrate to the court that there is evidence to warrant the issuance of a restraining order. (*In re*

Marriage of Nadkarni (2009) 173 Cal.App.4th 1483, 1496.) "To be facially sufficient under the DVPA, an application for a restraining order must allege abuse within the meaning of the DVPA," which includes engaging "in any behavior that has been or could be enjoined pursuant to Section 6320." (*In re Marriage of Nadkarni, supra,* 173 Cal.App.4th at p. 1496; Fam. Code, § 6203, subd. (d).) Indeed, even if his/her/their petition is facially *insufficient* to warrant the issuance of a temporary restraining order, the matter will still be set for a hearing, and he/she/they can attempt use evidence he/she/they has to demonstrate by a preponderance of the evidence that there has been a past act or acts of abuse. (Fam. Code, § 6320.5, subd. (b).)

To require that Petitioner include in his/her/their restraining order application all of the potential evidence to support he/she/they request for a restraining order puts enormous pressure on Petitioner to have all of he/she/they evidence available in advance of the hearing, which may prove an impossible feat. Petitioner may gather pieces of evidence previously unavailable to he/she/they as he/she/they prepares for the hearing that he/she/they would wish to submit to the court. And, some of the instances of abuse may occur after Petitioner submits the application for a domestic violence restraining order. There may also be violations of the temporary restraining order, which are very relevant to whether or not Petitioner needs separation and protection from the Respondent in the case. Incidents that occur *after* the temporary order is issued and could not possibly be demonstrated as part of the application for the temporary restraining order may also be material and relevant to whether a restraining order should be issued, what terms it should contain, and how long is should last.

To exclude those particularly salient pieces of evidence because of a policy of having petitioners include all of the evidence in their DV-100 declarations would be misguided. It not only limits the ability of victims of domestic abuse to present their case, but it also cuts against the very purpose of the DVPA, which is "to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." (Fam. Code, § 6220.)

CONCLUSION

In view of the foregoing, it is requested that the Petitioner be allowed to present relevant, admissible evidence at trial, even if that evidence was not included in his/her/their DV-100 petition.

Dated: _____ Signed: _____

(Name)_____
Petitioner