

SB 741, Discovery, and the DVPA

**Presented by
Senator Dave Min, Judge Lawrence Riff, Professor Jane Stoever, and Cory Hernandez
on January 5, 2024 (live & recorded)**

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

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ACBA = Alameda County Bar Association

Introductions

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- Senator Dave Min
 - Author of SB 741
- Judge Lawrence Riff*
 - LA Superior Court
 - Former supervising judge of family law division
- Professor Jane Stoever
 - Director, UCI Law DV Clinic & Initiative to End Family Violence
 - Sponsor of SB 741 (on behalf of clients)
- Cory Hernandez* (they/them)
 - Senior Managing Attorney, Family Violence Appellate Project



*Members, Judicial Council Family & Juvenile Law Advisory Committee

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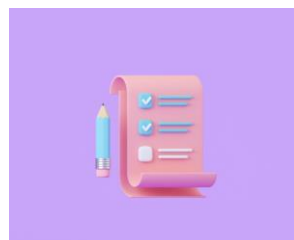
This program is co-presented by Senator Dave Min (SB 741 author), Judge Lawrence Riff (LA Superior Court, former supervising judge of Family Law Division), Professor Jane Stoever (UCI DV Clinic; UCI Initiative to End Family Violence), and Cory Hernandez (Family Violence Appellate Project). The UCI Initiative to End Family Violence sponsored SB 741. J. Riff and Cory are members of the Judicial Council Family & Juvenile Law Advisory Committee, and provided feedback on SB 741.

This program is co-sponsored by the UCI Initiative to End Family Violence, the Family Violence Appellate Project, the Alameda County Bar Association, and the Los Angeles County Bar Association.

Agenda & Learning Goals

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- SB 741: Discovery in DVPA Cases (DVROs)
- Bill history
- Statutory changes—new FC 6309
- Legislative findings and **intent**
- Request **procedures and requirements**
- Potential issues for appeal/writ petition
- Questions



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SB = Senate Bill

DVPA = Domestic Violence Prevention Act (FC 6200 et seq.)

(https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=FAM&division=10.&title=&part=&chapter=&article=)

DVRO = domestic violence restraining order

FC = Family Code

(<https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=FAM&tocTitle=+Family+Code+-+FAM>)

“Section” and “rule” may be omitted from statutory and rule citations, respectively

Major Takeaways

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- Discovery (if any) in DVPA cases now **governed by FC 6309**, e.g.:
 - Mutual DVROs (FC 6305)
 - DVRO renewals (FC 6345, subd. (a))
 - DVRO modifications/terminations (FC 6345, subds. (a), (d))
 - DVROs filed in other family law actions (FC 6360, 6361, 6380)
- Request can be made and decided at the **evidentiary hearing**
 - Judge may start the hearing and schedule another for discovery
 - If allow discovery, judge should extend, and may modify, **TRO**

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TRO = temporary restraining order

To see more about civil restraining orders in CA:

<https://selfhelp.courts.ca.gov/restraining-orders>

Major Takeaways (cont'd)

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- Judge exercises **discretion** in
 - Whether to permit discovery, and
 - If so, how much and what kind of discovery
- Judge must **balance**
 - Need of discovery
 - Getting info from other sources (e.g., questioning at hearing)
 - Importance of information
 - Potential for delay of deciding DVRO request (calendar preference)
 - Potential for trauma of survivor (litigation abuse, harassment)

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SB 741's History

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UCI Law Domestic Violence Clinic Cases



Proposing SB 741



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Jane & Sen. Min

Stats. 2023, ch. 503, eff. January 1, 2024. Find online here:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB741

California Discovery Limitations

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Marsy's Law Prohibitions-Criminal Cases



CA Civil Harassment Restraining Orders

CH-100 Request for Civil Harassment Restraining Orders

Can a Civil Harassment Restraining Order Help Me? (It) before completing this form. Also fill out Confidential nation (form CLETS-001) with as much information as y

Person Seeking Protection

a. Your Full Name:

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Marsy's Law generally doesn't apply to civil proceedings: *Slaeih v. Superior Court* (2022) 77 Cal.App.5th 266

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Legislative Intent



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Findings and Intent

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- Legislative findings (FC 6309, subd. (a)(1))
 - **Litigation abuse** recognized in prior DVPA caselaw and social science
 - Also recognized in FC 6344, subd. (b) (attorney's fees for respondents)
- Legislative intent (FC 6309, subd. (a)(2))
 - **Preempt** Civil Discovery Act
 - FC 210: CCP generally applies unless law says otherwise
 - Prevent litigation abuse
 - Ensure **expedited hearing**
 - Limit or prevent discovery
 - Depositions and interrogatories may not be needed because of declarations and live testimony



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Jane: efficacy and purpose of civil DVROs; avoid delay and weaponization of discovery to undermine legislative purpose

Cory: CCP = Code of Civil Procedure

Second point: See *Ashby v. Ashby* (2021) 68 Cal.App.5th 491, 516; *Lister v. Bowen* (2013) 215 Cal.App.4th 319, 336; *Avalos v. Perez* (2011) 196 Cal.App.4th 773, 777; see also Feb./Mar. 2023 Domestic Violence Report (vol. 28, no. 3) focused exclusively on litigation abuse in DV cases.

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

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Requesting DVPA Discovery



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Discovery Request Basics in FC 6309

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- Take into account findings and intent (subd. (b))
- Orally at hearing or in writing (subd. (c))
- Must find "good cause" to grant (subd. (c))



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Good Cause in FC 6309

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- Must consider certain **factors** (subd. (d)) both in
 - Deciding whether to permit discovery (subd. (d)) and
 - Deciding the method, amount, and timing of discovery (subd. (f))
- **Factors** (subd. (d))
 - Relevance
 - Importance
 - Need for info
 - Need for a particular method of discovery
 - Delay
 - Trauma
 - Restraining orders
 - Other factors



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Good Cause in FC 6309 (cont'd)

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- On **case-by-case** basis, courts use and consider
 - Common sense
 - Totality of circumstances
 - **Purposes of DVPA** (FC 6220, 6340, subd. (a)(1))
 - Safety, prevention, separation, protection
- **Impeachment** probably not sufficient
- **Written** probably less intrusive, trauma-risky than deposition



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Purposes of DVPA are also stated in AB 2089 (Stats. 2014, ch. 635), in section 1, Legislative Findings

(https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB2089) (emphasis added):

“(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.

(c) Domestic violence is not limited to actual and threatened physical acts of violence, but also includes sexual abuse, stalking, psychological and emotional abuse, financial control, property control, and other behaviors by the abuser that are designed to exert coercive control and power over the victim.

(d) There is a positive correlation between domestic violence and child abuse, and children, even when they are not physically assaulted, suffer deep and lasting emotional, health, and behavioral effects from exposure to domestic violence.

(e) Domestic violence victims face significant barriers to safely leaving an abusive relationship, including, but not limited to, a risk of retaliation and escalated violence by the abuser, concerns over the safety and custody of their children, an impending loss of financial support and housing, the responsibility for other household members and pets, and difficulties accessing legal and community systems to seek protection from abuse.

(f) Studies have shown that obtaining a civil protective order against an abuser can increase a victim's safety, decrease a victim's fear of future harm, and improve a victim's overall sense of well being and self-esteem.

(g) Because the issuance of civil protective orders often results in declines in domestic violence, public money spent on protective order intervention produces significant cost savings to society, including decreasing victims' time off from work, property loss, use of health services, and use of community, legal, and criminal justice interventions.

(h) Civil protective orders are most effective when they offer comprehensive relief to address the various barriers victims face when safely separating from an abuser, are specific in their terms, and are consistently enforced.

(i) For these reasons, the effective issuance and enforcement of civil protective orders are of paramount importance in the State of California as a means for promoting safety, reducing violence and abuse, and preventing serious injury and death."

Good Cause in FC 6309 (cont'd)

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- "In determining the meaning of 'good cause' in a particular context, the courts utilize **common sense based upon the totality of the circumstances**, which includes **the purpose of the underlying statutory scheme.**"
- "As a general rule, good cause includes reasons that are fair, honest, in good faith, not trivial, arbitrary, capricious, or pretextual, and **reasonably related to legitimate needs, goals, and purposes.**
- "The concept of good cause should not be enshrined in legal formalism; it calls for **a factual exposition of a reasonable ground for the sought order.**"
 - *Tanguilig v. Valdez* (2019) 36 Cal.App.5th 514, 527-528, cleaned up

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Tanguilig is an elder abuse restraining order case dealing with the issue of the standard to include additional protected parties on the EARO—"good cause." (WIC 15657.03, subd. (b)(4)(A).)

This is the same standard for DVROs. (FC 6320, subd. (a); see *M.S. v. A.S.* (2022) 76 Cal.App.5th 1139; *J.H. v. G.H.* (2021) 63 Cal.App.5th 633.)

EAROs and DVROs are construed similarly because of their similar statutory schemes and purposes. (*Gordon B. v. Gomez* (2018) 22 Cal.App.5th 92.)

Discovery Availability Under FC 6309

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- If granted, must be limited to "least intrusive methods" with "minimum number of items reasonably necessary to secure the requested information" (subd. (f))
- "Good cause" applies to either party's request
 - Still, the **subd. (d) factors** do generally prioritize having an expedited hearing, over allowing discovery
 - And the **subd. (a) findings and intents** do generally note, all else being equal, it's a respondent who's more likely to misuse discovery to commit litigation abuse



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How Judges Can Decide DVPA Discovery

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- **Tension** between relevance/importance, risk of delay, and risk of causing trauma
 - Discovery may not be necessary if hearing questioning suffices
 - Discovery can be denied if risk of trauma or delay too high
 - Limited interrogatories may be less intrusive than depositions
 - If deposition allowed, protective orders should issue
- FC 6309 supersedes the Civil Discovery Act
 - And FC 6309 supersedes FC 210, 218



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FC 210: "Except to the extent that any other statute or rules adopted by the Judicial Council provide applicable rules, the rules of practice and procedure applicable to civil actions generally, including the provisions of Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice and procedure in, proceedings under this code."

FC 218: "With respect to the ability to conduct formal discovery in family law proceedings, when a request for order or other motion is filed and served after entry of judgment, discovery shall automatically reopen as to the issues raised in the postjudgment pleadings currently before the court. The date initially set for trial of the action specified in subdivision (a) of Section 2024.020 of the Code of Civil Procedure shall mean the date the postjudgment proceeding is set for hearing on the motion or any continuance thereof, or evidentiary trial, whichever is later."

How Judges Can Decide DVPA Discovery (cont'd)

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- DVPA discovery request must be **more than a fishing expedition**
 - ▣ *Greyhound v. Superior Court* (1961) 56 Cal.2d 355
- Rather: **Informed offer of proof**
- Discovery allowed (if any) must be **least intrusive methods** and only for certain number of items
- **Meet and confer** not recommended for self-represented litigants, but could be good when both parties represented
 - ▣ DVROs are special cases, even if meet and confer is generally required for family law matters

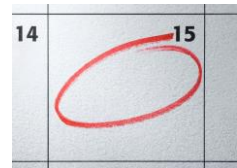
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Continuance in FC 6309

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- Granted for more time (subd. (e))
 - If hearing not yet commenced, court must extend, and may modify, any TRO (subd. (e)(1)(B))
 - If hearing commenced and court continues (subd. (e)(2)), court must still extend, and may modify, any TRO (FC 245, 6327)
- CRC 3.1332 also sets **grounds and factors** for continuances in all civil cases
- CRC 5.151 (ex parte family law) does **not** apply to DVPA actions



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Respondent's one right to a continuance (FC 245, subd. (a)) can be effectively waived/forfeited if they respond (*Goals for Autism v. Rosas* (2021) 65 Cal.App.5th 1041, 1046)

CRC = California Rules of Court (found online: <https://www.courts.ca.gov/rules.htm>)

Petitioners Requesting Discovery

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Could request in **DV-100 or separate filing**, with or after DV-100 (e.g., supplemental declaration)

May learn more about respondent, esp. if a DV-120 is filed



Court request at **hearing**

Party need not object to a discovery request before the hearing



Attorney's fees can cover discovery-related costs (FC 6344, subd. (a))

Petitioner does NOT have to file I&E (FL-150) and court shouldn't consider petitioner's ability to pay

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For more resources on DVPA attorney's fees, see: <https://fvaplaw.org/attorneys-fees-in-dvro-cases/>

Respondents Requesting Discovery

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Could request in **DV-120 or separate filing**, with or after DV-120 (e.g., supplemental declaration)



Court request at **hearing**

Party need not object to a discovery request before the hearing



Attorney's fees can cover discovery-related costs (FC 6344, subd. (b))

Respondent must meet certain requirements to get fees

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For more resources on DVPA attorney's fees, see: <https://fvaplaw.org/attorneys-fees-in-dvro-cases/>

Getting Other Information

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- FC 6309, subd. (g) does NOT
 - Limit **other rights** under DVPA
 - See also FC 6227, 6320, subd. (d)
 - Infringe on **abuse survivors'** access to their police reports and evidence (FC 6228)
 - Abuse survivor can be petitioner, protected party, or respondent
 - Infringe **on either party's** discovery of their own business records, w/o court permission--e.g., medical records, phone records, 911 calls



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FC 6227: "The remedies provided in this division are in addition to any other civil or criminal remedies that may be available to the petitioner."

FC 6320, subd. (d): "This section does not limit any remedies available under this act or any other provision of law."

Discovery & Vexatious Litigants

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- **Vexatious litigants** (CCP 391 et seq.)
 - Designation for someone who files, in pro. per., x# of cases in y# of years, which are frivolous or harassing
 - Recent bill: AB 2391 (Stats. 2022, ch. 84) expanded vexatious litigant designation availability for DVROAH-restrained parties
- **Pre-filing** requirements (CCP 391.7)
 - Available remedy if someone designated a vexatious litigant
 - Discovery generally excluded (subd. (d))



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Second point:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2391

Stats. = Statutes

ch. = chapter

subd. = subdivision

“et seq.” = and following

DVROAH = domestic violence restraining order after hearing

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Potential Issues for Appeal/Writ



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We're not prejudging any particular case or issue. Each case will have to be decided on its own facts, record, and arguments presented.

Appeal/Writ Issues

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- **Standard of review:** abuse of discretion, substantial evidence + prejudice
- Discovery grant/denial generally needs to be challenged by **writ petition**
 - Can also request an **immediate stay**
 - Trial court can also issue a stay (CCP 916 et seq.)
 - Can challenge by **direct appeal** from subsequent final order/judgment, which is itself appealable (CCP 904.1)
- Writ petition deadline: “reasonable” time; generally within **NOA deadline** (CRC 8.104, 8.108)



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NOA=Notice of Appeal

Prejudice/harmlessness: CCP 475 & Cal. Const., art. VI, s. 13

CCP 916 et seq.:

https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?chapter=2.&part=2.&lawCode=CCP&title=13.

CCP 475: “The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.”

Cal. Const., art. VI, s. 13: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Appeal/Writ Issues (cont'd)

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□ If **discovery is denied**:

- Can either party fairly present their case?
- Would discovery have made a difference to the ultimate outcome?
- Can the outcome be changed in another proceeding?



□ If **discovery is granted**:

- Will there be a timely hearing? (FC 244)
- Did/will the harm from discovery outweigh the benefits (info gained, if any)?

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Fourth point: see, e.g., *Nicole G. v. Braithwaite* (2020) 49 Cal.App.5th 990.

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Questions?



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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, through effective, free appellate representation and legal advocacy on important issues
- Offer free training and legal support for those helping survivors

- Most of our other panelists are not involved in FVAP's work or advocacy

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Email us with questions or for assistance: info@fvaplav.org

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

FVAP's website with free legal resources: fvaplav.org

FVAP's Land Acknowledgment

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FVAP acknowledges that we are on the traditional territory and homelands of California Native Peoples. These Nations include over 120 federally recognized tribes and many other non-recognized tribes that are all culturally diverse. FVAP acknowledges that we benefit from these unceded lands whose people are part of our communities.

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See this webpage where you can figure out if you are unintentionally harming native land rights and how to mitigate those harms: <https://nativegov.org/news/voluntary-land-taxes/>

“Voluntary land taxes function similarly to paying rent or a home mortgage. Our rent and mortgage payments give us access to living space; voluntary land taxes recognize our access to stolen Indigenous land. Each month (or on a set time interval), land tax participants pay an amount that goes directly to Native nations and/or organizations in their area. Some land tax programs are run by non-Indigenous residents working in partnership with Native nations and organizations; others are operated by Native-led nonprofits working toward Indigenous land return. Land taxes are not required and are entirely voluntary: it’s up to program participants to determine how much and how often they’d like to contribute.”

-Land taxes: 1) Way to “recognizing and respecting the sovereignty of Native Nations; 2) assists Native nations and organizations with needed resources and allow them to work toward regaining stolen land 3) RESPECT. “They demonstrate respect for the fact

that the land we occupy is still Indigenous land.”

WHY? Because we have benefitted from stolen indigenous land

Thank You!

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Survivor Helpline: (510) 380-6243

Free Technical Legal Assistance: info@fvaplaw.org

449 15th Street, Suite 104
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*Required to get MCLE.

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Last updated January 5, 2024.

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Evaluation link: <https://docs.google.com/forms/d/e/1FAIpQLSeFVBOhzUDwR2KTPE-v8ueTnrXTVDL4jed0tA7ezHxkGn0ZoQ/viewform>

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