

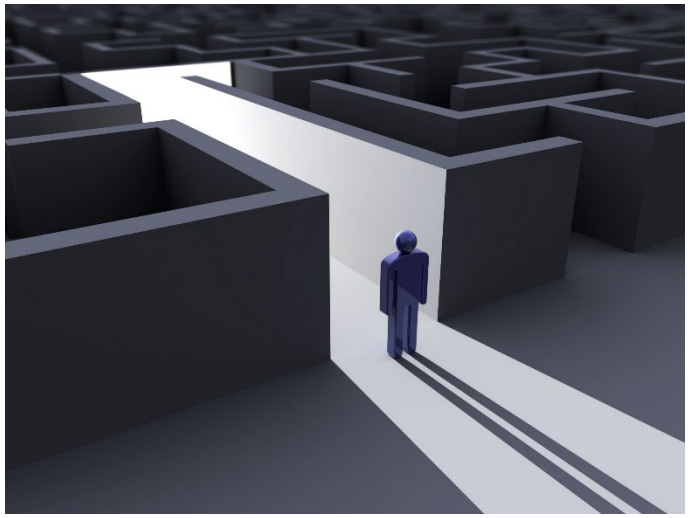

SB 741, Discovery, and the DVPA

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

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UCI Initiative to End Family Violence

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Introductions

- 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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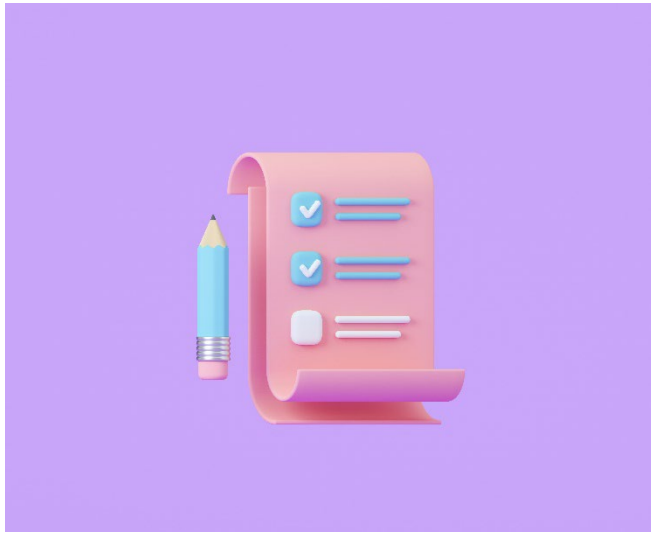
Agenda & Learning Goals

- 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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Major Takeaways

- 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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Major Takeaways (cont'd)

- 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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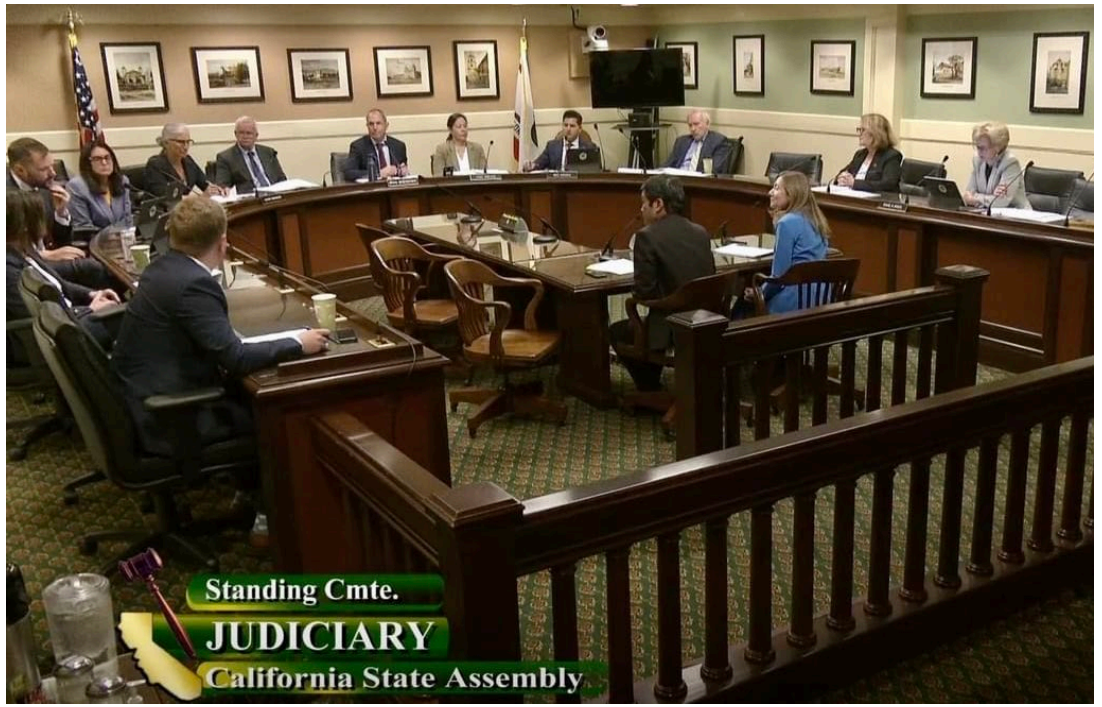
SB 741's History

UCI Law Domestic Violence Clinic Cases



Proposing SB 741



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DVRO Discovery in Other Jurisdictions

WA: Discovery is "disfavored and only permitted if specifically authorized by the court for good cause shown" (WRCA 7.105.200)

DC: Prohibits depositions in civil DVRO cases, requires judicial permission for written discovery on proposed interrogatories or requests (DC R Dom Violence Rule 8)



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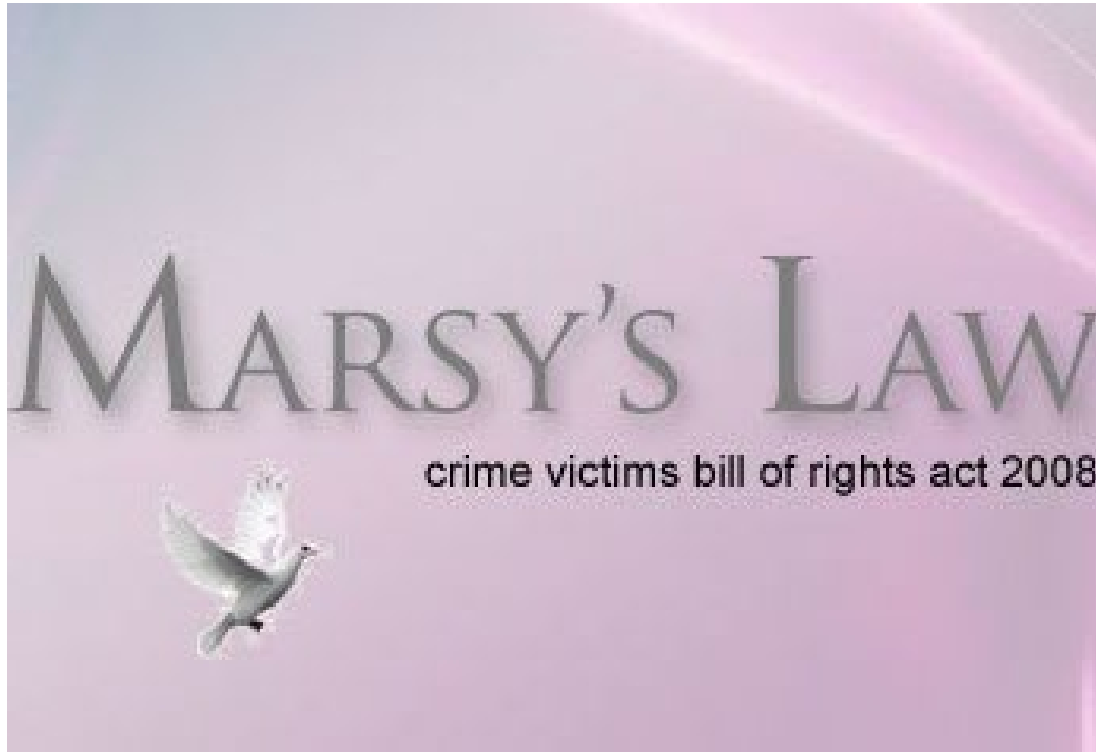
California Discovery Limitations

Marsy's Law Prohibitions-Criminal Cases



CA Civil Harassment Restraining Orders

CH-100 **Request for Civil Harass Restraining Orders**

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

Person Seeking Protection

a. Your Full Name:

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Legislative Intent



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Findings and Intent

- 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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Requesting DVPA Discovery



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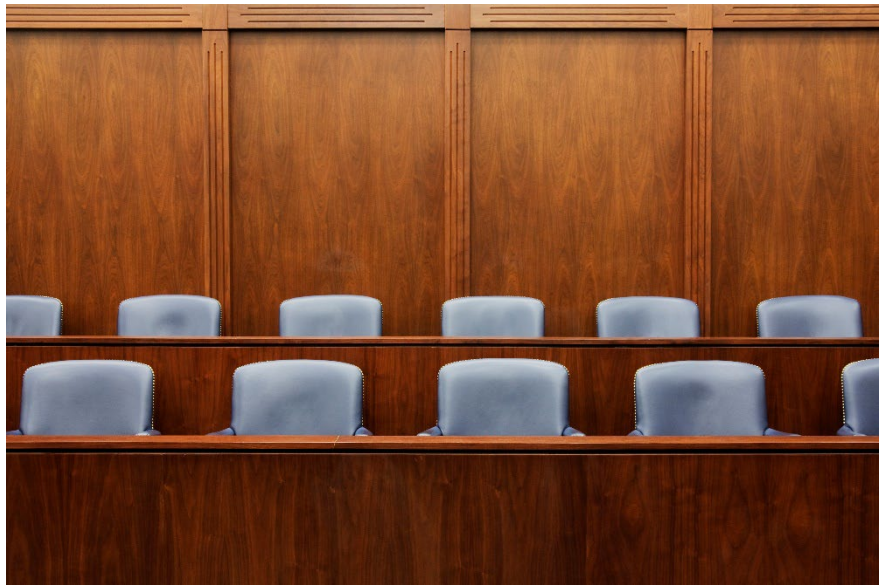
Discovery Request Basics in FC 6309

- 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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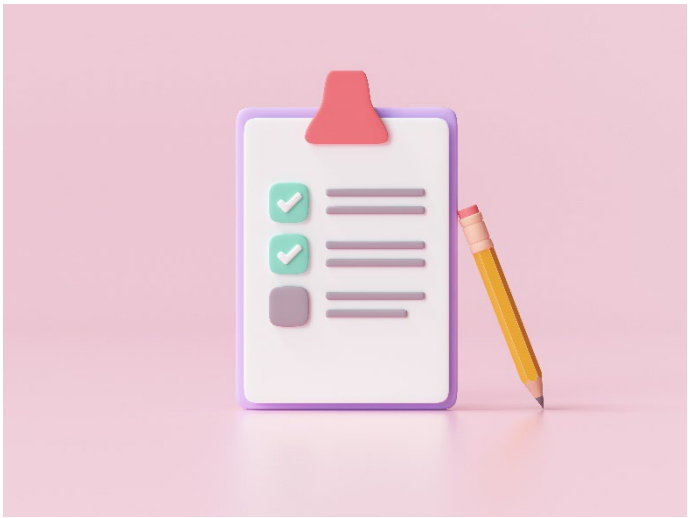
Good Cause in FC 6309

- 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)

- 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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Good Cause in FC 6309 (cont'd)

- "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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Discovery Availability Under FC 6309

- 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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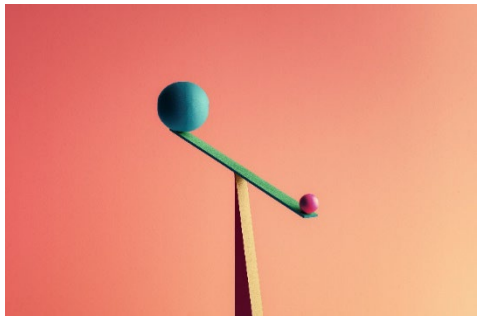
How Judges Can Decide DVPA Discovery

- **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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How Judges Can Decide DVPA Discovery (cont'd)

- 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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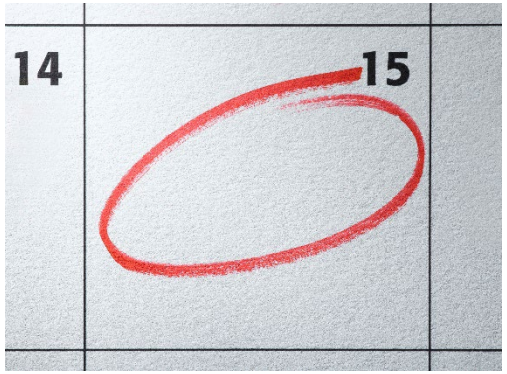
Continuance in FC 6309

- 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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Petitioners Requesting Discovery



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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Respondents Requesting Discovery



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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Getting Other Information

- 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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Discovery & Vexatious Litigants

- **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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Potential Issues for Appeal/Writ





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Appeal/Writ Issues



- **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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Appeal/Writ Issues (cont'd)



- 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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Questions?



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FVAP's Work

- 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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FVAP's Land Acknowledgment



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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Thank You!

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