CHAPTER 1
DOMESTIC VIOLENCE: YOUR CLIENT, THE LAW, & SOCIETY

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A. Introduction

> *"[W]e've come a long way. Back when [Vice President] Joe [Biden] wrote this law [the Violence Against Women Act of 1994 (VAWA)], domestic abuse was too often seen as a private matter, best hidden behind closed doors. Victims too often stayed silent or felt that they had to live in shame, that somehow they had done something wrong. Even when they went to the hospital or the police station, too often they were sent back home without any real intervention or support. They felt trapped, isolated. And as a result, domestic violence too often ended in greater tragedy.*
>
> *"So one of the great legacies of [VAWA] is that it didn't just change the rules; it changed our culture. It empowered people to start speaking out. . . . And it made clear to victims that they were not alone—that they always had to a place to go and they always had people on their side. . . .*
>
> *". . . So today is about all the survivors, all the advocates who are [here]. But it's also about the millions more they represent[.] . . . It's about our commitment as a country to address this problem—in every corner of America, every community, every town, every big city—as long as it takes.*
>
> *"And we've made incredible progress since 1994. But we cannot let up—not when domestic violence still kills three women a day. Not when one in five women will be a victim of rape in their lifetime. Not when one in three women is abused by a partner."*
>
> *-U.S. President Barack Obama remarks on signing the 2013 Reauthorization of VAWA*[i]

This chapter of the pro bono manual is meant to introduce you to the social phenomenon and issue that is domestic violence (DV), including how its victims[1] interact with the law, society, and, of course, you. While fully understanding domestic violence law takes much more time and space than this chapter would allow[ii], think of this manual as "DV 101." Each section contains one or more footnotes that list numerous articles, cases, reports, and other documents, from which much of the information provided is collected and synthesized.[2] Note also other chapters of this manual cover some of these issues—particularly the legal issues DV victims face in family and other civil law—in much greater depth.

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[1] Although the term "survivor" may generally be used in lieu of "victim," and notwithstanding the political ramifications behind using one term over the other, we use "victim" throughout this manual with these understandings: (1) not everyone who is subjected to domestic abuse survives, and (2) the legal system, for better or worse, still generally refers to people subjected to abuse as "victims."

[2] If you find a statement of fact or law for which you do not see a source, and you have a question about it, please email FVAP. (See http://www.fvaplaw.org.)

B. DV Facts[iii]

DV affects all populations and peoples, across the U.S. and around the world. Victims and perpetrators come from all types of backgrounds—including all sexes, genders, gender identities, sexual orientations, socioeconomic statuses, races, ethnicities, (dis)ability levels, military/veteran statutes, languages, nationalities, immigration statuses, religions, beliefs, and creeds.[3] Statistics on the prevalence of DV are provided below in dot-list format, mainly drawn verbatim from the National DV Hotline—which is also a great phone number for victims and their advocates to know: 1-800-799-7233.

1. DV (Generally)

- On average, 24 people per minute are victims of rape, physical violence or stalking by an intimate partner in the United States — more than 12 million women and men over the course of a year.

- Nearly 3 in 10 women (29%) and 1 in 10 men (10%) in the U.S. have experienced rape, physical violence and/or stalking by a partner and report a related impact on their functioning.

- Nearly 15% of women (14.8%) and 4% of men have been injured as a result of IPV that included rape, physical violence and/or stalking by an intimate partner in their lifetime.

- 1 in 4 women (24.3%) and 1 in 7 men (13.8%) aged 18 and older in the United States have been the victim of severe physical violence by an intimate partner in their lifetime.

- IPV alone affects more than 12 million people each year in the U.S.

- Nearly half of all women and men in the United States have experienced psychological aggression by an intimate partner in their lifetime (48.4% and 48.8%, respectively).

- Females ages 18 to 24 and 25 to 34 generally experienced the highest rates of intimate partner violence.

- From 1994 to 2010, about 4 in 5 victims of intimate partner violence were female.

[3] A quick note on pronoun usage is in order. It is undeniable most DV victims are cisgender (i.e., non-transgender) heterosexual women, and most DV perpetrators are cisgender heterosexual men. However, it is also clear DV affects every demographic, and, for populations already facing great oppressions and obstacles (due to, e.g., race, sexual orientation, gender identity, disability, socioeconomic status, ethnicity, religion, etc.), DV may be that much more difficult to handle. Without a doubt, DV services, including legal services, must be provided to everyone; hence, resource manuals like this one should discuss DV issues in a way that includes everyone. Therefore, this chapter will generally use the gender-neutral singular pronoun "they" to refer to a non-gender specific person.

- Most female victims of intimate partner violence were previously victimized by the same offender, including 77% of females ages 18 to 24, 76% of females ages 25 to 34, and 81% of females ages 35 to 49.

- DV rates among same-sex couples are about the same as, if not more than, different-sex couples.

2. Sexual Violence

- Nearly 1 in 10 women in the United States (9.4%) has been raped by an intimate partner in her lifetime.

- 81% of women and 35% of men who experienced rape, stalking, or physical violence by an intimate partner reported significant short- or long-term impacts such as post-traumatic stress disorder symptoms and injury.

- More than half (51.1%) of female victims of rape reported being raped by an intimate partner and 40.8% by an acquaintance.

- For male victims, more than half (52.4%) reported being raped by an acquaintance, and 15.1% by a stranger.

- An estimated 13% of women and 6% of men have experienced sexual coercion in their lifetime (i.e., unwanted sexual penetration after being pressured in a nonphysical way). 27.2% of women and 11.7% of men have experienced unwanted sexual contact (by any perpetrator).

3. Stalking

- One in 6 women (16.2%) and 1 in 19 men (5.2%) in the United States have experienced stalking victimization at some point during their lifetime in which they felt very fearful or believed that they or someone close to them would be harmed or killed (by any perpetrator).

- Two-thirds (66.2%) of female victims of stalking and 41% of male victims were stalked by a current or former intimate partner.

- Repeatedly receiving unwanted telephone calls, voice, or text messages was the most commonly experienced stalking tactic for both female and male victims of stalking (78.8% for women and 75.9% for men).

- An estimated 10.7% of women and 2.1% of men have been stalked by an intimate partner during their lifetime.

4. Teens, Youth, & Students

- One in 10 high school students has experienced physical violence from a dating partner in the past year.

- Among victims who ever experienced rape, physical violence, or stalking by an intimate partner, about 1 in 5 women and nearly 1 in 7 men first experienced partner violence between 11 and 17 years of age, and most did so before 25 years of age.

- 43% of dating college women report experiencing violent and abusive dating behaviors including physical, sexual, tech, verbal or controlling abuse.

- Nearly 1 in 3 (29%) college women say they have been in an abusive dating relationship.

- 52% of college women report knowing a friend who has experienced violent and abusive dating behaviors including physical, sexual, tech, verbal or controlling abuse.

- 1 in 3 (36%) dating college students has given a dating partner their computer, email, or social network passwords and these students are more likely to experience digital dating abuse.

- 1 in 5 college women has been verbally abused, and 1 in 6 sexually abused, by a dating partner.

- 1 in 4 dating teens is abused or harassed online or through texts by their partners.

- Victims of digital abuse and harassment are 2 times as likely to be physically abused, 2.5 times as likely to be psychologically abused, and 5 times as likely to be sexually coerced.

- Of teen victims, about 84% are psychologically abused by their partners, half are physically abused, and one-third experiences sexual coercion.

C. Power & Control[iv]

DV has no precise agreed-upon definition; however, it is fair to say DV is generally considered a range of behaviors used by one intimate partner to exert power and control over another. This is sometimes also called intimate partner violence (IPV) or family violence although the latter could conceptually also include child abuse, elder abuse, and the like.

Legal definitions of DV in California are generally found in statutes, and are provided below in section D. DV can include any type of abuse used by one intimate partner over another, including financial, psychological, emotional, verbal, physical, and sexual abuse. Abusers can also abuse someone close to an intimate partner, like a child, parent, friend, or animal, to essentially abuse the intimate partner via harassment or disturbing their peace. DV also includes

litigation abuse, when an abuser exploits the legal system to continue controlling the victim; and even includes actions like making, or threatening to make, false reports to Child Protective Services (CPS) to remove children from the victim's care, or reports to immigration officials to put the victim's immigration status in jeopardy.

Abusers can also destroy or otherwise injure a victim's property, and often try to control a victim with excessive jealousy and possessiveness, as well as by limiting the victim's access to social contact and finances. Abusers often try to exert control over (almost) every aspect of the victim's life, and may exploit their reproductive or health status to abuse them via methods like birth control sabotage, other reproductive abuse, and hiding or restricting access to needed medications, such as hormones for trans victims or prescribed medications for victims with chronic illnesses. Despite the fact that many abusers try to limit their abuse to private settings, like the home, some abusers will attack or abuse victims in public or at their job, including excessive phone-calling, showing up uninvited and unannounced to abuse them, or even abusing the victim's coworkers.

Remember the digital and electronic age we live in: think of how much information you can find out about someone or something online. Now imagine you could possibly get someone else's passwords and other sensitive information, because of the intimate relationship you have with them and the power you exert over them. Abusers often use GPS tracking technology in electronic equipment like cell phones and cars, and other tracking techniques like social media websites, to keep 24/7 watch on their victims—this is sometimes referred to as intimate surveillance.

It is important to note abusers are typically not "out of control," as some myths of abusers portray them. Abusers often calculate when and how to abuse their victims. For instance, many will abuse their victims only behind closed doors, in a specific location in the house, or even on a specific part of the body so bruises do not show. Various iterations of the Power and Control Wheel, which describes a range of typical types of abuse, can be found in Appendix A—including the original model and ones for LGBT relationships, immigrant women, teens, and people with disabilities. Further, abusers often cycle abuse with conciliatory "honeymoon" periods, as discussed below in Section G: Cycle of Violence.

D. Legal Definitions

The two main areas in which DV needs to be defined include (1) the definition in the Family Code used for DV restraining orders (DVRO), and other family and civil law matters; and (2) the definition in the Penal Code used for criminal prosecutions. Other areas of state law often reference the definitions found in the Family Code or Penal Code. Federal law, like the Violence Against Women Act of 1994, as reauthorized in 2000, 2005, and 2013 (see, e.g., 18 U.S.C. § 922 & 42 U.S.C. § 13701 et seq.), also defines DV for various purposes.

1. DV Prevention Act (DVPA)[v]

The DVPA is found at Family Code section 6200 et seq. Section 6203 of the Family Code provides:

> "(a) For purposes of this act, 'abuse' means any of the following:
>
> > "(1) To intentionally or recklessly cause or attempt to cause bodily injury.
> >
> > "(2) Sexual assault.
> >
> > "(3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
> >
> > "(4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.
>
> "(b) Abuse is not limited to the actual infliction of physical injury or assault."

Section 6320 further defines abuse, in relevant part:

> "(a) . . . molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in Section 528.5 of the Penal Code, falsely personating as described in Section 529 of the Penal Code, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party. . .
>
> "(b) . . . taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of" "any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent."

2. Penal Code

Section 13700 provides, in relevant part:

> "(a) 'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.
>
> "(b) 'Domestic violence' means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement

relationship. For purposes of this subdivision, 'cohabitant' means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as spouses, (5) the continuity of the relationship, and (6) the length of the relationship."

Many other statutes in the Penal Code reference this definition, or provide their own.

E. Societal Considerations[vi]

Scholarship on intersectionality teaches us that people face and overcome various and numerous oppressions in disparate ways. For instance, while, of course, racism impacts people of color—and sexism and misogyny impacts women, trans, and gender non-conforming persons—it is generally now understood that men of color, women of color, and trans and gender non-conforming persons of color experience their societal oppressions in quite distinctive ways. Add onto that other societal oppressions—whether in the form of socioeconomic status, sexual orientation, disability, or something else—and it is clear to see the almost countless ways people can be impacted and thus can experience this aspect of our supposedly shared society.

1. DV, Employment, Work, & Socioeconomic Status[vii]

DV affects the workplace, as the below National DV Hotline statistics demonstrate.

- Nearly 33% of women killed in U.S. workplaces between 2003-2008 were killed by a current or former intimate partner.

- Nearly one in four large private industry establishments reported at least one incident of domestic violence, including threats and assaults, in 2005.

- A survey of American employees found that 44% of full-time employed adults personally experienced domestic violence's effect in their workplaces, and 21% identified themselves as victims of intimate partner violence.

- 64% of the respondents in a 2005 survey who identified themselves as victims of domestic violence indicated that their ability to work was affected by the violence. More than half of domestic violence victims (57%) said they were distracted, almost half (45%) feared getting discovered, and two in five were afraid of their intimate partner's unexpected visit (either by phone or in person).

- Nearly two in three corporate executives (63%) say that domestic violence is a major problem in our society and more than half (55%) cite its harmful impact on productivity in their companies.

- Nine in ten employees (91%) say that domestic violence has a negative impact on their company's bottom line. Just 43% of corporate executives agree. Seven in ten corporate executives (71%) do not perceive domestic violence as a major issue at their company.

- More than 70% of United States workplaces do not have a formal program or policy that addresses workplace violence.

- Nearly 8 million days of paid work each year is lost due to domestic violence issues – the equivalent of more than 32,000 full-time jobs.

- 96% of domestic violence victims who are employed experience problems at work due to abuse.

Indeed, DV tends to affect most the workers who are already most oppressed, including women of color, trans and LGBQ folks, undocumented immigrants, and migrant workers. Additionally, DV is correlated with economic stress and hardship, and it may disproportionately impact lower-income people. Moreover, law enforcement may tend to focus on other crimes in low-income neighborhoods, including street crimes like drug and property offenses. However, data reporting may be skewed toward showing lower-income women experiencing higher rates of DV, since higher-income women generally live in areas with more privacy and where law enforcement do not typically patrol, and because lower-income victims are less likely to have sufficient resources to deal privately with the problem.

Low-income victims often have very few choices when trying to leave a relationship. They can seek space in a free shelter—if one is nearby, has a bed available for them and their children (note that some shelters do not permit boys above a certain age), and is accessible to their demographic (e.g., some shelters do not allow trans folks)—live on the streets, or stay with a family member or friend. Even when government assistance is available for basic necessities such as food and housing, victims often face substantial hurdles—such as lengthy applications and lack of transportation—in accessing these programs. Moreover, they generally must use publicly available medical and mental health programs and agencies helping DV victims—assuming they live in an area where those are available. More frequent contact with agencies providing these services may create more opportunity for reporting and documenting DV among low-income victims. This in turn might foster a distorted societal understanding that DV does not occur often in middle or upper-income people.

2. Race, Ethnicity, Cultural Sensitivities, & a Right to Free Interpreters[viii]

Whatever "culture" means to you or anyone else, no culture should be able to justify DV for any reason. (See also the discussion below on DV defendants using the cultural defense in criminal cases.) Unfortunately, though, most cultures today, including the U.S., likely are seen by most people as, at best, ambivalent, or, at worst, supportive of DV. (For the U.S., consider

the fact that we recently elected an abuser of women to the presidency, not to mention the thousands of celebrities, policymakers, police officers, and judges who are abusers and who remain in those positions of power and authority.) Nonetheless, many Americans view the U.S. as atop a pedestal when it comes to violence against women: they decry so-called "dowry deaths," female genital cutting, and "honor killings," but do not exhibit nearly the same disgust or disdain of the same or similar practices here.

As mentioned, DV tends to have the most impact on those who are already oppressed in some other way, such as low-income people. Thus, it is not surprising that people of color—especially women, LGBTQ+ folks, indigenous peoples, and immigrants—tend to feel the brunt of DV more so than White people. Native Americans (in most legal terms, "Indians") living on tribal land also face greater hurdles to accessing DV services given their precarious legal status and the complex interplay between federal and Tribal law and sovereignty. Moreover, law enforcement generally have poor relations with people of color, meaning DV victims of color may be less likely to contact the police when needed, possibly for fear that the police may harm them or even the abuser.

For victims who do not speak English, or do not speak it well, free interpreters must be provided under Evidence Code section 755 in DV civil cases in California courts, if the victim qualifies for a fee waiver. Sign language interpreters are required under the ADA and other laws. On August 7, 2010, the Department of Justice released a letter to all chief justices and state court administrators receiving federal funding to clarify their obligations under Executive Order 13166 (enacted 2000), which requires providing free interpreters for limited English proficient (LEP) people. (Title VI of the Civil Rights Act of 1964 (see 42 U.S.C. § 2000d et seq.) prohibits discrimination in programs and activities receiving federal financial assistance, based on, among other things, national origin.) This executive order includes oral interpretation, written translation, and other languages.[ix]

3. Sexual Orientation, Sexuality, Sex, & Gender Identity[x]

Applying DV statutes and their protections only to different-sex couples, or otherwise excluding same-sex couples, likely violates the equal protection and due process clauses of the U.S. and state constitutions. The same is likely when IPV involves trans people.

Abuse within the LGBTQI+ (lesbian, gay, bisexual, trans, queer, questioning, intersex, and/or more) community can be especially problematic. For instance, many, if not most, services and programs dedicated to helping DV victims focus on assisting heterosexual cisgender women. Plus, law enforcement are generally apathetic or outright hostile toward queer and trans people, and double arrests of non-heteronormative and/or trans couples are also common—in part because LGBTQI+ people are more likely to fight back against the abuser, and because law enforcement cannot figure out who is the dominant aggressor. Nor can many courts figure out the dominant aggressor, thus yielding higher rates of mutual restraining orders in these relationships.

The LGBTQI+ community also tends to be relatively small and many therein are not fully out to their friends, family, and coworkers—meaning victims may not speak out due to

shame or embarrassment. For instance, victims may have no one to turn to whom they trust if they live in a rural community with few people who are openly LGBTQI+. Furthermore, gay men, especially those of color, are still stigmatized by the HIV/AIDS epidemic—and even those with HIV/AIDS may need additional care and support—and so they may put up with the abuse to be otherwise taken care of by the abuser. LGBTQI+ victims with children are much more likely to have other adults involved in the children's lives who could have a potential legal claim to some custody or visitation of the child, as a result of, for example, second-parent or third-party adoption. Victims are thus exposed to complex legal and social issues, and it might appear difficult to a court to figure out the intimate partner and familial relationships correctly.

In addition to the "standard" letters of the "queer alphabet soup" (LGBTQI), other groups may fall within the general ambit of non-heteronormative relationships, and they may face unique barriers to accessing legal recourse. For instance, polyamorous individuals who have multiple partners may run into issues explaining non-monogamy to a court with so-called "traditional" views of relationships. Virtually every published case involving DV, and the statutory provisions they interpret, contemplates intimate partnerships between only two persons. This would make it more difficult, for instance, if a victim of two (or more) simultaneously abusive intimate partners attempts to obtain DVROs protecting themselves against both abusers; a court may be skeptical and refuse to issue either protective order.

4. DV Against Victims with Disabilities[xi]

DV victims with physical and/or mental disabilities, whether prior to or due to the abuse, may face many obstacles when attempting to deal with or leave the relationship, or even seeking any kind of help. Depending on the disability(ies) the victim has, the abuser may be able to easily control their movement, medications, and other aspects of their life. Moreover, some victims with certain disabilities may not understand or accept what is happening to them, or that they can seek assistance, or, generally, that they deserve better. In addition, victims with disabilities are often lower-income and reliant on government assistance, thus putting them in a more vulnerable position for exploitation and control by the abuser and legal systems. See section H below for a discussion on interacting with a client with a disability who is a DV victim.

5. DV Takes a Toll on the National Economy[xii]

While the full economic impact of domestic violence on the US economy--including costs of medical and mental health care, as well as lost work productivity--is unknown, it is undoubtedly high. Recent analyses by the Institute for Women's Policy Research reported that:

- In 1995, the most recent year for which an estimate is available, the aggregate societal economic cost of intimate partner violence in the United States was $5.8 billion. This equates to $9.3 billion in 2017 dollars.

- Health care costs for women experiencing abuse were up to 42% higher than costs for nonabused women, in a 2004 survey. Even among women who experienced abuse five years prior to the survey, costs remained 19% higher than their nonabused counterparts.

The increased costs result from acute post-incident care as well as chronic health problems related to the abuse.

- For victims who sought treatment after a physical assault by an intimate partner, the mean cost for medical care in 1995 dollars was $2,665 per incident ($4,273 in 2017 dollars), and for mental health services, $1,017 per incident ($1,631 in 2017 dollars). For those raped by an intimate partner, the figures were $2084 for medical care and $978 for mental health ($3,342 and $1,568 in 2017 dollars).

- Female DV victims over age 18 lose nearly 8 million paid work days per year. In one poll, 64% of DV victims reported that their ability to work was affected by the abuse. In another, 60% of female victims reported having quit their jobs or been terminated as a result of the abuse.

F. Separation Issues[xiii]

Think about the latest news headlines about a celebrity couple and allegations of DV—whether a professional sports player, politician, entertainment star, police officer, or who have you. It is a virtual certainty at least one news segment covering the incident will feature a pundit asking why the victim—usually a heterosexual cisgender woman—"chose" to stay: "Why didn't she just leave?"

It is important to remember an abuser never *has to* batter; it is always their choice. Still, the victim is often the second-best at figuring out what may help alleviate or temporarily stop the abuse, and they can likely foretell that trying to leave poses a huge risk. Indeed, multiple studies show violence escalates during a separation period—often referred to as "separation assault"—and can even lead to death. (Think about any recent mass shooting, and chances are the perpetrator was or is a domestic abuser.)

It is also important to keep in mind that many victims do not actually want to permanently separate from the abuser; often, victims simply want the abuse to stop. This is part of why many victims do not want to pursue criminal charges, or later recant at trial, even if they called the police for help. Every abusive relationship is unique, although there are of course common themes, like power and control, and elements of the cycle of violence. The victim and abuser may have had a relatively good relationship for years before the first incident of abuse, or the abuse may have only recently started escalating beyond a tipping point. Remember to meet your client where they are, and keep in mind that, even if they choose to drop a DVRO or criminal case and return to the abuser, they may try to leave again in the future. Try to be supportive of them and their choices, to the extent you can while upholding your legal and ethical duties to them and others, and put yourself in their mind as someone who will be there that next time.

Victims may not be able to leave because of a lack of social connections, financial independence, or knowledge about resources. Non-English speakers have a particularly hard time leaving and navigating resources likely available in one or, at best two or three, languages.

Undocumented victims and those with precarious immigrant statuses could also fear deportation or other retaliation. If the victim and abuser work together, the victim may feel they need to leave the job to leave the relationship, but be unable to find other employment. And victims with children in common with the abuser will be particularly hard-pressed to leave because the abuser likely has legal rights of visitation and custody, the children may prefer the abusive parent over the victim, or the victim may still want to keep the other parent in the children's lives.

Leaving an abusive relationship is not a small task. Most victims who leave an abusive relationship take an average of 5-7 attempts before they are finally successful. Many victims who flee often aim for a time they know the abuser is asleep or away, which could require extensive planning, like talking to friends and family members, therapists, clergy, and the like, to ensure they have a supportive safety net. If the victim and abuser live together, leaving is that much more difficult, as shelters are sparse throughout the country, and often full. Plus, many shelters have strict rules and turn away victims who may have been previously convicted of some crime (whether DV-related or not) as well as victims with male children who may be past a certain age; and most shelters accept only cisgender women. And if the abuser and victim are of the same sex, the abuser may try to infiltrate the shelter by posing as a victim.

G. Cycle of Violence

Dr. Leonore Walker developed and popularized the "cycle of violence," which generally consists of three stages, outlined below and further explained in Appendix B. Although Walker's model starts with "tension-building" and proceeds to "honeymoon," it is important to note that even before tensions first build, a typical DV relationship, like every other intimate relationship, starts with a positive, romantic "honeymoon" phase.

(1) Stage 1: Tension-building. Here, the victim can usually sense the growing frustration and may try to placate the abuser, keep the children away, avoid controversial topics of discussion, and even give in to sexual pressures. (Marital rape and sexual assault, including by coercion, are often overlooked in DV—and are still treated by the legal system differently than other DV, and differently than non-intimate partner sexual assault and rape.) Victims often speak of feeling like they are walking on eggshells during this stage. Eventually, no matter what the victim does, the abuser chooses to abuse again.

(2) Stage 2: Violence. Here, the first violent incident may start off relatively minor, like a slap across the face or grabbing someone's arm so hard it leaves a bruise, but as the relationship goes through the cycle various times, the abuse generally escalates to serious violence and possibly even death. If the victim lives, the abuser then usually enters the third stage.

(3) Stage 3: Honeymoon Phase. Here, the abuser generally apologizes to the victim, swears it will never happen again, and attempts to appease them with gifts and praise. Many victims report this phase feeling like the relationship had been before the abuse started, where the abuser is behaving "like normal."

Of course, not every DV relationship fits this model. Indeed, without intervention, many may follow this cycle for a while but then devolve into a daily switch between the first two stages and the elimination of the third. Plus, some DV relationships may have "only" non-physical abuse, yet still be severely harmful.

It is also important to note the mismatch between the timing in the criminal justice system and the cycle of violence. The victim, sensing that tension is building and that an acute battering incident is coming, may be rebuffed when they seek help during this stage. For instance, the police may tell the victim to call back when a crime actually occurs, or the prosecutor may decline to charge because the only injuries at this point are minor. On the other hand, soon after the more major battering incident occurs, and the criminal justice system is ready to respond, the victim and perpetrator may have already entered the loving reconciliation phase, and thus the victim may refuse to cooperate. In spite of this, information such as cards or brochures given to the victim during any part of the cycle as to where to get help may be useful: they may keep it and be able to use it when the tension-building phase begins again (e.g., to obtain a DVRO). Additionally, explaining the cycle of violence to a DV victim can be useful in helping the victim see the importance of getting away from the abuser before the violence repeats and becomes worse.

H. Working with Abused Clients

DV victims may have trouble being the best clients. Trauma from abuse can cause them to appear disorganized, disoriented, and unable to tell their stories in a linear fashion. Additionally, especially in the initial stages of litigation, a victim likely still lives with or has significant contact with the abuser, especially if they have children in common; fear of future abuse may also have been, and continue to be, present. These factors can cause a victim to present poorly at the trial level, and can also affect their relationship with you as their trial or appellate attorney.

Also, remember other societal considerations discussed above (see § E) that may influence how a person interacts with you.

1. Behavioral & Psychological Issues[xiv]

The tendency to view victims as abnormal has been used successfully by abusers in both criminal and civil cases. Although many victims may have mental health diagnoses or issues that would be characterized under the guise of "abnormal" psychology—such as PTSD, depression, and anxiety—most develop these symptoms *because of* the abuse, not prior to it. Symptoms of PTSD include avoiding situations or sensory objects (e.g., sights and smells) associated with the abusive events, re-experiencing the abuse via nightmares or flashbacks, hyper-vigilance, irritability, suicidal thoughts, numbness, and difficulty concentrating or sleeping. These symptoms tend to persist for years after the abuse, making the victims prime targets for being deemed unfit to parent or take care of themselves.

2. Impact of Behavioral & Psychological Issues on the Attorney-Client Relationship

Post-separation, victims feel usually feel a range of emotions at different times. When screening for clients, remember that DV victims do not fit one single model, stereotype, or expectation.

a. When the Victim Denies or Rationalizes the Abuse

DV victims have various coping mechanisms for dealing with or ignoring the abuse; after all, they have their lives to live, which may include their children, job, friends, and so on. Some try to deny, minimize, or rationalize the severity or existence of the abuse.

In attorney-client interviews, the victim's minimization and denial of domestic violence may be decreased when they are encouraged to describe what happened ("What did they do when they got angry?"), rather than by asking the victim to evaluate whether his or her partner's behavior was abusive ("Did they hurt you?"). This will often provide attorneys with the information necessary to ascertain the facts. Still, it is often useful to begin an interview with a hesitant or reluctant client with open-ended questions ("How has he/she/they hurt you?").

Also, just because a client may not want to include certain abusive incidents when presenting their case to the court, does not mean the incident did not take place or the client is exaggerating. For instance, some victims may tell you about incidents involving rape by the abuser, but may not want to include them in court papers due to shame, embarrassment, or fear. In these cases, as in cases where you may exclude information that is legally irrelevant but highly significant to the victim, it is nonetheless important to listen to the victim and validate their feelings.

b. The Victim May Feel They Provoked or Otherwise Deserved the Abuse

Whether used as a coping mechanism, or because the abuser has convinced them to think this way, some victims may claim they provoked the violence or say they deserved it. Actual provocation is no more common in DV cases than in other crimes. Moreover, what actions truly would justify the use of such violence? In criminal cases, keep in mind the focus is usually on the perpetrator. For example, do we ask why a bank advertises its large holdings when it gets robbed?

c. Sometimes the Victim-Client Does Not Show Up

Given what has been discussed above (see, e.g., § H.1) about the trauma a victim will likely suffer from the abuse—and its effects on their social life, ability to work, psychology, etc.—it should surprise no one that victims may not show up at a scheduled interview or hearing, or may even decide to drop their petition or appeal. Remember to meet your client where they are; do your best to respect their feelings and be sensitive, while also ensuring you uphold your ethical duties to your client, the court, and the profession. Keep in mind also that a victim may have already interacted unsuccessfully with the law enforcement or the legal system in some

way, or may be an immigrant with precarious status; therefore they may have lost hope or trust in what assistance you, as part of the system, can provide. After all, most victims take an average of 5-7 times to leave the relationship, and likely some of those previous attempts to leave involved calling the police, staying at a government-funded shelter, or petitioning for a DVRO.

Other victims may not show up due directly to the abusive relationship. Some perpetrators may make it physically impossible for the victim to show up, steal the victim's mail, immediately enter the "honeymoon stage" in the Cycle of Violence, or use other tactics to pressure the victim to drop the DVRO petition, criminal charges, or appeal. Further, some abusers may exploit the victim's limitations in English proficiency or understanding of the local legal system to keep them isolated. Moreover, the victim may have to move a couple of times for their safety while you represent them, yet they may forget to inform you; gently remind them.

These reactions are normal, not pathological. Of course, if your victim-client is not cooperating to an extent where you can no longer meaningfully represent their interests—while upholding your ethical, legal, and moral duties to them—then it would be appropriate for you to discuss this with your client, who may not understand the level of commitment you expect for a given case. You might also seek some assistance yourself, such as working with a DV advocate or counselor. At the same time, you must be prepared for a victim-client who may choose to drop a criminal prosecution, DVRO request, or appeal. In these times, it is useful to practice and display empathy toward their situation, and do not judge; accept what the client wants, and simply remind them you are available in case they need anything in the future.

There are other reasons a victim may not cooperate fully, by, for example, not telling their full story of all the incidents of abuse, or not showing up to every meeting or hearing. These include the attorney communicating a lack of belief about the abuse, either verbally or nonverbally, or the attorney or court staff blaming the victim or not taking the abuse seriously. Keep an open mind and remember that there is no "perfect" or "model" victim.

d. "He Doesn't Seem Like That Kind of Guy": Understanding Abusers[xv]

Batterers, like victims, generally test "normally" on popular psychological and personality tests, and in clinical interviews. Generally, abusers present themselves in public as calm and rational, and try to paint the victim as the "crazy" or irrational one. (On the other hand, if the abuser presents as hostile and aggressive to the court, the judge may wonder why the victim "chose" to stay with someone like that, thus depreciating the victim's credibility.) Some abusers may be so delusional as to minimize or deny the abuse altogether—or at least their fault in perpetrating it. Most, though, who lie to third parties, including courts and law enforcement, know what they are doing. Nonetheless, abusers may suffer from chronic, severe issues, including alcohol and substance abuse or dependence, childhood abuse, and other personality or psychiatric disorders or illnesses. It is still worth repeating: there is never an excuse or justification for DV.

Although many do not believe abusers "seem like that kind of guy," if the victim attempts to seek help or leave the relationship, many of those beliefs go out the window as the abuser escalates the violence—often to a point of (attempted) homicide (when the victim is female, the

term femicide is appropriate), homicide-suicide (killing the victim, and then themselves), or familicide (killing multiple close family members, and then themselves). And although a causal relationship between DV and mass terrorism is not established, an analysis of mass shootings—defined as those having four or more victims—between 2009 and 2016 found that more than half of the incidents involved the perpetrator killing an intimate partner or family member(s).[xvi]

Fortunately, studies suggest a court finding that DV has occurred, especially in the context of providing a protective order, can be crucial to stopping, interrupting, or mitigating the abuse. And state laws, including California's, that mandate surrender of firearms in the abuser's possession when a DVRO is issued, are associated with significantly lower rates of both overall and gun-related intimate partner homicide.[xvii]

I. Effects on Children & DV Victims as Parents[xviii]

Children are also victims of DV. They can be directly abused themselves, and/or can witness and take in the abuse and toxic environment—even if they do not see or hear it themselves. Below are some fast facts from the National DV Hotline.

- A child witnessed violence in 22% (nearly 1 in 4) of intimate partner violence cases filed in state courts.

- 30 to 60% of perpetrators of intimate partner violence also physically or sexually abuse children in the household.

- There is a common link between domestic violence and child abuse. Among victims of child abuse, 40% report domestic violence in the home.

- The U.S. Advisory Board on Child Abuse and Neglect suggests that domestic violence may be the single major precursor to child abuse and neglect fatalities in this country.

There is a significant correlation between wife abuse and child physical abuse, with the most conservative estimates suggesting at least a 30% overlap. Other studies found rates of child abuse in homes with partner abuse as high as 70%. Many children as victims of DV are isolated by the abuser, just as the victim-parent is, and so may cling to either or both parents, out of a desire to love and be loved, notwithstanding the abuse they are suffering. Some children may blame the victim-parent, perhaps because the abuser convinces the child they are asking for it; and after separation, the abuser may tell the children they could be a family again, if it were not for the victim-parent keeping them apart.

For some children, the violence begins in utero, as pregnancy may represent the onset of violence or at least a significant risk period because of women's increased vulnerability during this time. This violence is associated with a significant incidence of low birth weight and birth defects. Pregnant women who are battered are four times more likely to have miscarriages than women who are not abused.

There is also evidence that cisgender male spousal abusers are more likely to sexually abuse their daughters or the daughters of their partners than non-abusers. Recent studies have found between 25% to 30% of cisgender male abusers sexually abuse their children, and girls are six times more likely to be victims of sexual abuse in a household where their mother is also being abused. A prominent study found that child sexual abuse allegations arose in less than 2% of contested custody cases. Keep in mind that false allegations of child (sexual) abuse, just like false allegations of DV, are approximately the same as any other crime, i.e., around 2-5% of allegations. Still, courts, CPS, and law enforcement may disbelieve such allegations because, for instance, the child may feel comfortable disclosing the abuse only when the victim-parent has separated from the abuser.

Just as victim-parents respond differently to abuse, so too do children: some become introverted and may have developmental disorders or otherwise miss developmental milestones, while others may become aggressive and oppositional at home and in public—perhaps because they know no other type of acceptable behavior, or because they are trying to protect themselves or cry for help.

Effects on children vary with their age and level of development, as the below list demonstrates:

- Infants exposed to violence may face significant disruptions in basic sleep and feeding schedules. This can result in "failure to thrive" symptoms, depression, and lethargy. Infants are also at risk of being dropped or injured in the cross-fire when their abusive parent abuses their victim parent.

- Preschool children who witness violence may suffer from nightmares or other sleep disturbances, as well as confusion and insecurity shown by excessive clinging to adults and fear of being left alone. They also may be unable to develop empathy, the ability to put oneself in another's shoes and feel for them, at the age-appropriate time.

- School-age children may require significant mental health intervention. Their response may also be dependent on their gender. In general, girls tend to internalize symptoms, resulting in depression, anxiety, withdrawal, and somatic complaints; boys tend to externalize through destruction of property, disobedience in school, fighting, attacking people, hostility and aggression. However, newer studies indicate that girls, as they grow older, are also exhibiting aggressive external behaviors.

- Many children believe the violence is their fault, or that it is justified in some way; they also may believe it is an appropriate form of conflict resolution. They may miss school in order to protect their victim parent, and they may be physically injured when they are "caught in the fray" between their parents.

- Adolescents may run away from home, or abuse drugs and alcohol. The abuse may also impact their dating relationships, either in their attitudes condoning violence in a romantic relationship or in getting involved in an abusive relationship. Additionally,

adolescents, especially older ones, may intervene to try to protect their victim parent, and pay a large price themselves.

Importantly, how children and their parents respond to the abuse—and are perceived by courts and law enforcement—may differ depending on their race, sexual orientation, disability, or other factors. For instance, victims of color—especially poor mothers of color—are more likely to be found guilty of failing to protect their children from an abuser, and are more likely to lose custody or visitation rights.

The long-term impact of childhood exposure to DV is most apparent in adult relationships. Studies—particularly, the Adverse Childhood Experiences (ACE) study—have found that family violence is one of the most consistent predictors of relationship violence among adults. Sons of severe cisgender male batterers had rates of spousal abuse ten times higher than those from non-violent families, and daughters from abusive homes were less likely to seek help if they later entered into a DV relationship. Children growing up in violent and abusive homes are:

- 24 times more likely to commit sexual assault.
- 74% more likely to commit crimes against another person.
- 6 times more likely to commit suicide.
- More likely to engage in teen prostitution.
- Twice as likely to be victims of sexual or physical assault as adults.

Factors that tend to mitigate the effects of witnessing adult abuse include alternative adult role models, strong and positive attachments to the child's victim-parent, and extensive supports within the community, such as clinical and judicial interventions.

As discussed above, the violence usually does not end with separation of the parents. (See § F.) Thus, attorneys and courts should think about how best to protect the children, as well as the DV victim, during the post-separation period. Since many victims are not able to make a final break from the batterer until leaving and returning several times, the children are often exposed to multiple disruptions and repeated violence. Sometimes, then, the government may attempt to remove the child from the victim-parent's care, claiming a "failure to protect" them from the DV, as discussed further below.

Furthermore, studies have shown abusers tend to contest custody and visitation more often than non-abusers, perhaps due to their generally aggressive personality or desire to continue harming the victim-parent and to maintain control. Attorneys must take steps with their clients and the court to prevent further abuse through the court system, sometimes termed litigation abuse. Abusers are generally also less likely to abide by court orders, including paying support or working within visitation schedules, so violations thereof should be recorded and brought to the court's attention.

J. Safety: Protecting Your Client & Yourself[xix]

Safety planning with your client is crucial, and should be done intentionally and frequently enough as their matter progresses. Ensure that their location and personal information remain secure and confidential, to the extent possible. For instance, DV victims can enroll in the Safe at Home Program, which allows them to maintain their address as confidential, and have their first class mail sent to them at an address provided by the California Secretary of State, then forwarded to their confidential address. Under Family Code § 6225, victims generally do not need to provide their address or contact information on a DVRO petition; they may request from the court the same for other civil law proceedings. Your client can also change their locks, for free, by statute—or have their landlord do this. Advise your client to secure or remove from the home weapons, safe objects, and other potential weapons. Your client should also pack an emergency get-away bag and have an emergency exit plan in case the abuser escalates violence or becomes violent again. Inform your client of legal developments in their matter in advance, particularly when a batterer is about to be served or when a hearing is approaching, so your client can take extra safety precautions as needed.

In addition, social media accounts, if maintained, should be kept in the most secure and locked settings. Location devices on social media and other accounts, and, if possible, on personal devices like laptops and cell phones, should be disabled or restricted. Your client may consider changing their passwords more frequently than usual, as a way to prevent a technologically savvy abuser from breaking into their devices and accounts. Your client may also want to block the abuser's phone number, which may require calling the cell phone company for more information; if there is a fee for this service, consider explaining to the company the exigent circumstances of the abuse. In issuing a DVRO, a court can order a wireless company to transfer the victim's cell phone number off the family plan without penalty (Fam. Code § 6347.)

When initially establishing the attorney-client relationship, make sure to ask the victim when you can call; whether other people, including the abuser, has access to the provided number; and whether you can safely leave a message saying who you are or what you are calling about. And when you do call the client, speak only to your client about the case. You should also talk with your client about whether you should block your number by dialing *67 or something else; you may request from your local telephone service provider that your phone number be automatically blocked from any Caller ID technology. As with phone communication, send regular mail and electronic mail to your client only when and where your client has told you is safe.

The victim also needs to plan for safety when thinking of serving the abuser with court papers or attending court themselves, especially given the tendency for violence to escalate during these separation periods. Be sure whoever serves an abuser understands their role and the risks; and consider asking the sheriff to attempt service for free, as they could do in DVRO cases when there is a fee waiver or the abuser is in custody. Before going to court, work with the victim to ease stress and anxiety, and practice testimony and relaxation techniques for when they enter the courtroom and see their abuser again. At court, ensure the abuser and their friends and family do not talk with or sit by your client. Ensure your client is accompanied or accounted for

at all times; ask the bailiff to provide an escort after a DVRO hearing; and consider having the client bring a support person, as discussed next. You can also ask the judge to keep the abuser in the courtroom for a few minutes after a hearing, to give your client sufficient time to leave safely.

Family Code § 6303 provides that your client is allowed to have a support person in court. The support person may sit with the victim at counsel's table during a proceeding if the victim is unrepresented, and may accompany the victim to mediation if there is a protective order in place. But this person may not give legal advice or otherwise attempt to "influence" a proceeding or mediation, or they may be removed by the judge or mediator. This support person can be anyone selected by the victim, and requires no special training.

If the victim is separating from the abuser and their household, advise them they can request a civil standby from their local police or sheriff department, to help provide some on-site protection as they are removing their items from the abuser's household. These procedures are at law enforcement's discretion; usually the assigned officers remain for fewer than thirty minutes, so consider having a friend or family member, or hired movers if possible, with the victim during the potentially contentious time. Victims may also need to consider changing work hours, locations, and travel routes, to avoid encountering the abuser. If the victim obtains a DVRO, they should tell neighbors, co-workers, friends, and family members about the order—and perhaps provide them with copies of the order and a photo of the abuser—in addition to other places the victim frequents, including childcare facilities and the children's school. Copies should be given to local law enforcement, and kept with the victim at home and on their person.

In addition, attorneys should be aware of their own safety. Some studies have shown family law to be the most contentious and dangerous areas of law, for practicing attorneys and clients. Some lawyers representing domestic violence victims have been threatened or injured by batterers or their family members. Additionally, cases can be very stressful; vicarious trauma is a real phenomenon. Listening to the brutality to which batterers subject their partners and family members can be overwhelming for attorneys. Sometimes professionals, including attorneys, dealing with DV problems engage in what psychologists term "cognitive dissonance," meaning that they cannot face the extent of the abuse, so they revise the facts. These cases may also remind attorneys of abuse in their own families, their relationships, or the relationships of friends. Plus, exposure to DV can put us all in touch with our own vulnerability. This can make it difficult to provide high-quality representation. Therefore, it is a good idea for attorneys to set up their own support systems. These may include support groups, professional counseling, exercise, vacations, rest, meditation, art, music, or other activities that are rejuvenating. A peer counseling program that is recommended and available in many areas is Re-Evaluation Counseling (RC). (See http://www.rc.org.)

Moreover, an attorney often is ill-equipped to deal with every aspect of a DV victim's life. In order to better serve the client and manage their own stress, some attorneys who accept DV cases help arrange for the victim to join a victims' support group or begin some form of counseling, and require or strongly suggest that the client attend. This may seem autocratic, but it can often be an essential piece of providing adequate representation, given that many victims need to be heard and understood as much as they need legal assistance. When a client receives

counseling or other therapeutic treatment, they are better able to assist in their own legal affairs. Further, by encouraging such counseling, attorneys can help avoid being too much of a venting area for the domestic violence victim while simultaneously assisting the client in getting psychological and emotional support. In addition to counselors, other DV-related services include shelters, hotlines, and DVRO clinics; they can also consult on cases, and may have staff who are able to qualify as expert witnesses. Develop a referral list including the National Domestic Violence Hotline (1-800-799-SAFE or 1-800-787-3224 TDD), local shelters, domestic violence programs, batterers' intervention programs, and children's programs. Give clients copies of the list if they have a safe place to keep the copies. Attorneys may want to copy the brochure that all California police and sheriff's departments are required to give to victims of domestic violence or sexual assault, as it will include local phone numbers. (See Pen. Code §§ 13701(c)(9), 264.2(a).)

K. Legal Issues

1. The Historical Response of the Legal System[xx]

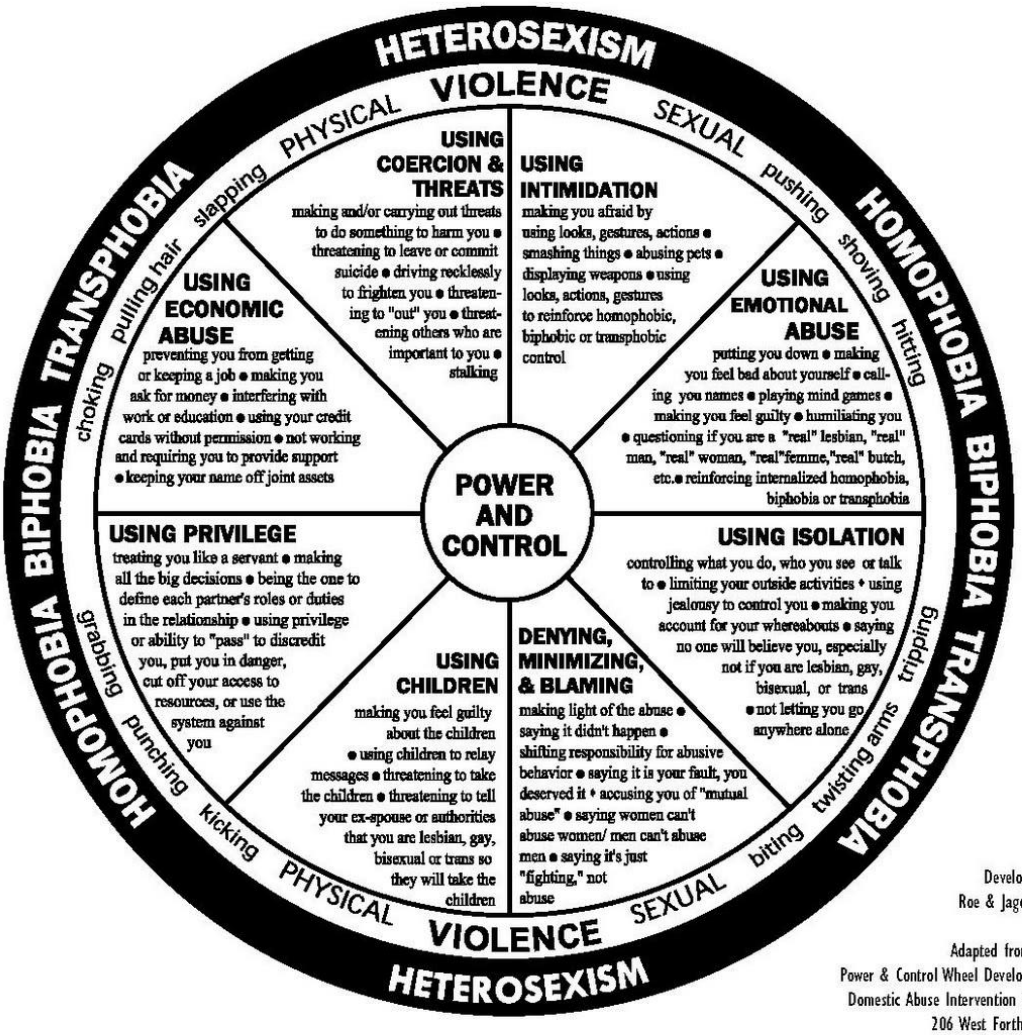
One reason representing DV victims can be difficult is, until quite recently, the historical response of the legal system to DV has been ambivalence, condonation, or actual encouragement. Husbands were generally deemed to have the prerogative to "discipline" their wives, reflecting the prevailing church doctrine at the time. The only supposed limitation on the husband's prerogative, or duty, to beat his wife was found in the so-called "Rule of Thumb," which stated that the husband was limited in the beatings to a stick no bigger around than his own right thumb. Some sources attribute this rule to Roman law, specifically the Laws of Chastisement, dating from 753 B.C. Under these laws, the husband's right to discipline his wife was vested in his status as sole head of the household and his consequent responsibility for any crimes the wife might commit. This ancient rationale for tolerating wife-beating was incorporated into English, and then U.S., common law, and can be found in such cases as *Bradley v. State* (1824) 1 Miss. 156— this case was not overruled until 70 years later, in *Harris v. State* (1894) 71 Miss. 462, which referred to *Bradley* as a "revolting precedent."

In response to this deplorable position with regard to DV, a battered women's movement grew out of the women's rights movement in the 1960's and 1970's (sometimes also called the "second wave" of feminism). Safety from future abuse for themselves and their children was battered women's most pressing need. Battered women's shelters started to be established during the 1970's in the U.S. Once the structure for establishing emergency shelters was in place, advocates in the battered women's movement turned some of their attention to the legal system, especially the criminal legal system, with enactment of policies and laws that mandated or encouraged arrest and no-drop prosecution.

Although the official government policy now is generally not to tolerate such violence, there continues to be difficulty with implementing this policy. Individual attitudes of members of the public (who may become jurors), the media, elected officials, and movers in the legal system continue to influence the ways this policy is carried out, with change in this area occurring at a relatively slow pace.

Appendix A: Power and Control Wheels[xxi]

Power and Control Wheel for Lesbian, Gay, Bisexual and Trans Relationships



Developed by
Roe & Jagodinsky

Adapted from the
Power & Control Wheel Developed by
Domestic Abuse Intervention Project
206 West Forth Street
Duluth, MN 55806

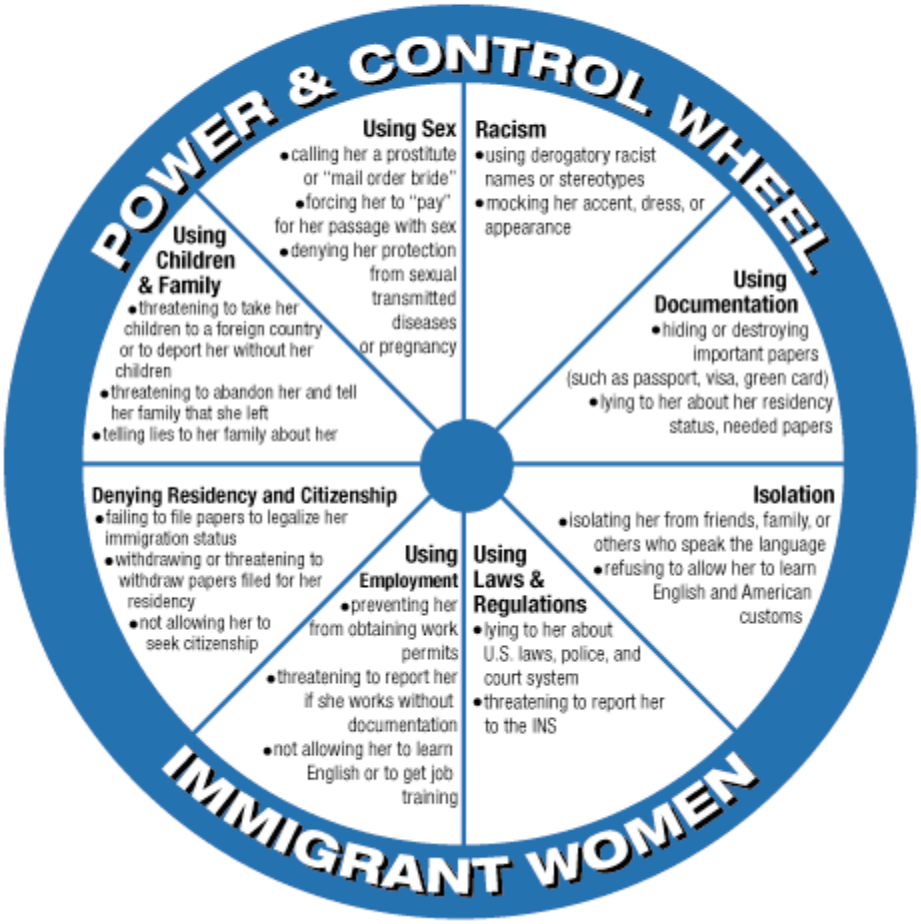
Adopted by:

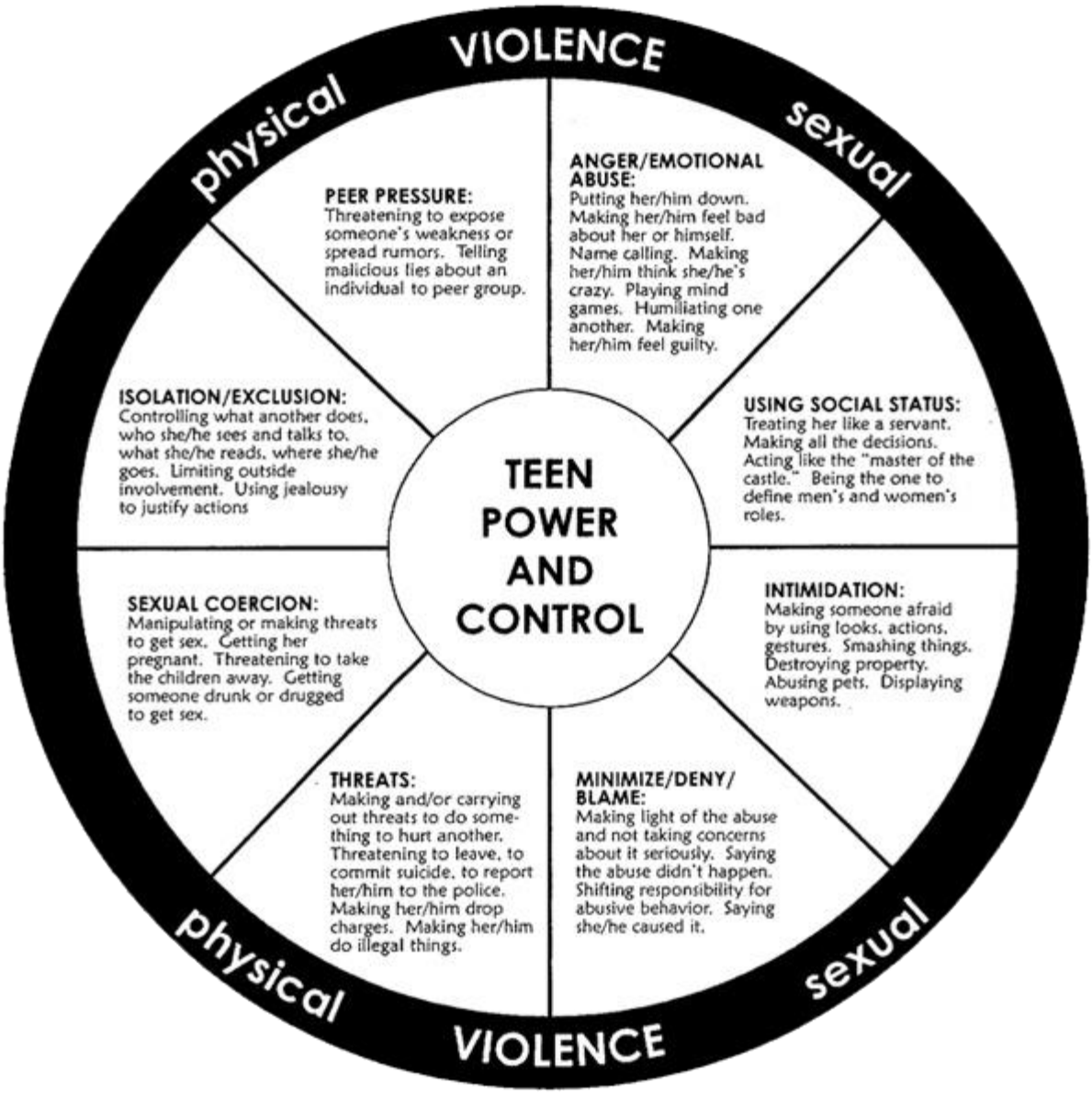
Texas Council On FAMILY VIOLENCE
P.O. Box 161810 • Austin, TX 78716
512/794-1133 • Fax: 512/794-1199

THE POWER AND CONTROL WHEEL
(For Immigrant Women)

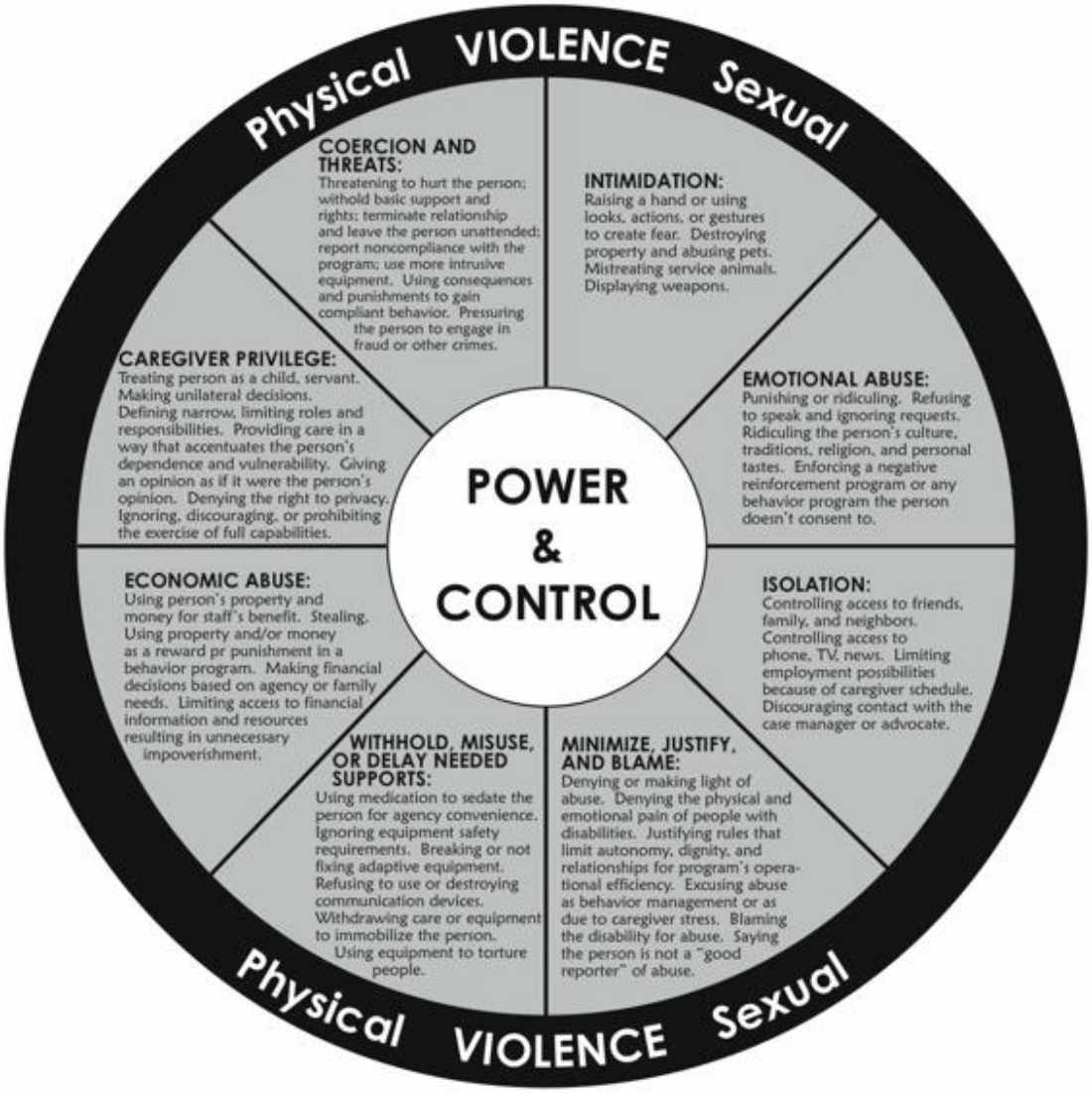
(Source www.life-span.org/immigrantwomenwheel.html)

ways in which victims feel controlled by their abusers and behaviors abusers use against victims




VIOLENCE
physical
sexual
TEEN POWER AND CONTROL
PEER PRESSURE: Threatening to expose someone's weakness or spread rumors. Telling malicious lies about an individual to peer group.
ANGER/EMOTIONAL ABUSE: Putting her/him down. Making her/him feel bad about her or himself. Name calling. Making her/him think she/he's crazy. Playing mind games. Humiliating one another. Making her/him feel guilty.
ISOLATION/EXCLUSION: Controlling what another does, who she/he sees and talks to, what she/he reads, where she/he goes. Limiting outside involvement. Using jealousy to justify actions
USING SOCIAL STATUS: Treating her like a servant. Making all the decisions. Acting like the "master of the castle." Being the one to define men's and women's roles.
SEXUAL COERCION: Manipulating or making threats to get sex. Getting her pregnant. Threatening to take the children away. Getting someone drunk or drugged to get sex.
INTIMIDATION: Making someone afraid by using looks, actions, gestures. Smashing things. Destroying property. Abusing pets. Displaying weapons.
THREATS: Making and/or carrying out threats to do something to hurt another. Threatening to leave, to commit suicide, to report her/him to the police. Making her/him drop charges. Making her/him do illegal things.
MINIMIZE/DENY/BLAME: Making light of the abuse and not taking concerns about it seriously. Saying the abuse didn't happen. Shifting responsibility for abusive behavior. Saying she/he caused it.
physical
sexual
VIOLENCE

POWER & CONTROL WHEEL: PEOPLE WITH DISABILITIES AND THEIR CAREGIVERS



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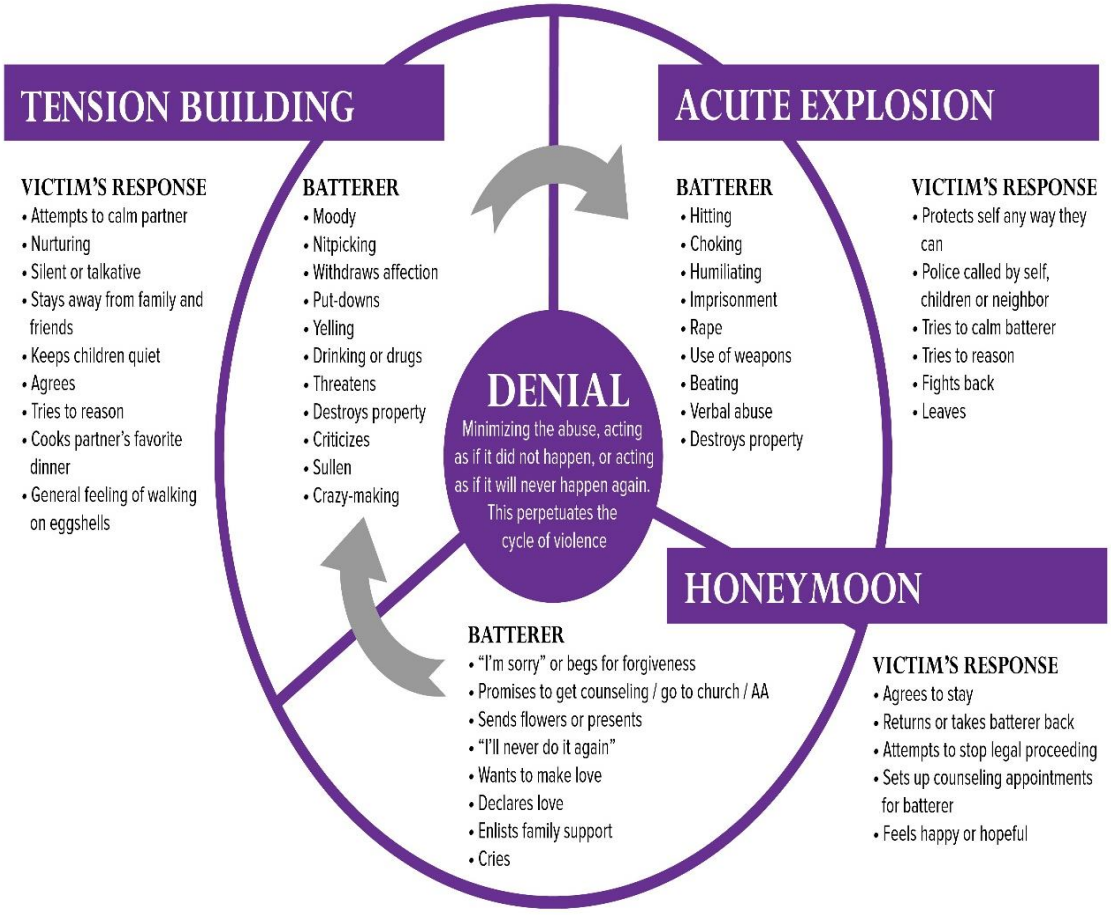
Appendix B: Cycle of Violence



Notes

[i] Off. Press Sect., The White House, Interior Dep't, *Remarks by the President and Vice President at Signing of the Violence Against Women Act* (Mar. 7, 2013), available at <https://obamawhitehouse.archives.gov/the-press-office/2013/03/07/remarks-president-and-vice-president-signing-violence-against-women-act> (last accessed Sept. 2017).

[ii] See, e.g., Nancy K. D. Lemon, Domestic Violence Law (5th ed., West Publishing, 2018).

[iii] Nat'l Domestic Violence Hotline, *Statistics*, available at <http://www.thehotline.org/resources/statistics/> (last accessed Sept. 2017); Break the Cycle, *Dating Abuse Statistics*, available at <https://www.breakthecycle.org/how-common-dating-abuse> (last accessed Sept. 2017); Alicia Hawley et al., *Domestic Violence Shelters' Efforts to Prevent Teen Dating Violence: A National Survey* (2016) 1 Violence Against Women 1; Kelly Alison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform* (2015) 21 Wm. & Mary J. Women & Law 525 (*Digging*); Ashley LeBrun, *Are We There Yet?—VAWA 2013: Same-sex Legal Acceptance* (2015) 39 Seton Hall Legis. J. 101; Michael P. Johnson et al., *Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required* (2014) 20 Violence Against Women 186 (*Intimate Terrorism*); D. Kelly Weisberg, *Lindsay's Legacy: The Tragedy that Triggered Law Reform to Prevent Teen Dating Violence* (2013) 24 Hastings Women's L.J. 27; Jennifer Parker, *Different Names for the Same Thing: Domestic Homicides and Dowry Deaths in the Western Media* (2012) 83 U. Colo. L. Rev. 1181; Jacquelyn C. Campbell, *Sanctions and Sanctuary: Wife-battering Within Cultural Contexts*, in To Have and To Hit: Cultural Perspectives on Wife Beating (2d ed., SAGE Publications, 1999); William E. Mitchell, *Why Wape Men Don't Beat Their Wives: Constraints Toward Domestic Tranquility in a New Guinea Society*, To Have and To Hit, *supra*; David Levinson, *Societies Without Family Violence*, in Family Violence in Cross-cultural Perspectives (SAGE Publications, 1987). (The last three pieces are excerpted in Lemon, supra footnote 3.)

[iv] See Evan Stark, *Current Controversies: Coercive Control*, in Sourcebook on Violence against Women, C. Renzetti, J. Edleson & R. Bergen (eds.) (3d ed., SAGE Publications, 2018) 26-29; Emilio C. Ulloa et al., *The Big Five Personality Traits and Intimate Partner Violence: Findings from a Large, Nationally Representative Sample* (2016) 31 Violence & Victims 1100; Olivia S. Garber, *Animal Abuse: Why the Connection Justifies Increased Protection* (2016) 47 U. Mem. L. Rev. 359; Carla Smith Stover & Andrew Kiselica, *Hostility and Substance Use in Relation to Intimate Partner Violence and Parenting among Fathers* (2015) 41 Aggressive Behavior 205; Nickeitta Leung, *Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage* (2015) 15 U. Md. J. Race, Religion, Gender & Class 146; Karen E.C. Levy, *Intimate Surveillance* (2015) 51 Idaho L. Rev. 679; David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation against Domestic Violence Survivors* (2015) 14 Seattle J. Soc. Just. 429; Paul J. Fleming et al., *Risk Factors for Men's Lifetime Perpetration of Physical Violence against Intimate Partners: Results from the International Men and Gender Equality Survey (IMAGES) in Eight Countries* (2015) 10 PLoS ONE 3 (doi:10.1371/journal.pone.0118639) (*Risk Factors*); Sonia Salari, *Intimate Partner Homicide-Suicide in Later Life: Understanding Motives and Risks* (2015) 21 Domestic Violence Report 1; Behre, *Digging*, *supra*, at note 5; Marcus Juodis et al., *What Can Be Done about High-Risk Perpetrators of Domestic Violence?* (2014) 29 J. Family Violence 381; Vivek Upadhya, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization (*2014) 63 Emory L.J. 1163; Shane M. Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response* (2012) 100 Cal. L. Rev. 721; Justine A. Dunlap, *Intimate Terrorism and Technology: There's an App for That* (2012) 7 U. Mass. L. Rev. 10; Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of DV: Statistical Data for Lawyers*

Considering Equal Protection Analysis (2009) 17 Am. U.J. Gender Soc. Pol'y & L 229; *Hernandez v. Ashcroft* (9th Cir. 2003) 345 F.3d 824. (several of these articles are excerpted in Lemon, footnote 3.)

[v] See *Phillips v. Campbell* (2016) 2 Cal.App.5th 844; *Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389; *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140.

[vi] See Donna Coker, *Domestic Violence and Social Justice: A Structural Intersectional Framework for Teaching about Domestic Violence* (2016) 22 Violence Against Women 1426; Krista McQueeney, *Teaching Domestic Violence in the New Millennium: Intersectionality as a Framework for Social Change* (2016) 22 Violence Against Women 1463; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color* (1991) 43 Stan. L. Rev. 1241.

[vii] See Nat'l DV Hotline, *Statistics*, *supra*, at note iii; Sharon G. Smith et al., Centers for Disease Control & Prevention, The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (2017); Karen Oehme et al., *Improving the Emergency Medical Services System's Response to Domestic Violence* (2016) 26 Health Matrix 173; Margo Lindauer, *"Please Stop Telling Her to Leave." Where Is the Money: Reclaiming Economic Power to Address Domestic Violence* (2016) 39 Seattle U.L. Rev. 1263 (*Economic Power*); Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse* (2014) 20 Wm. & Mary J. Women & L. 339 (*Financial Freedom*); Linda L. Bryant & James G. Dwyer, *Promising Protection: 911 Call Records as Foundation for Family Violence Intervention* (2014) 102 Ky. L.J. 49; Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women* (2012) 20 Am. U.J. Gender Soc. Pol'y & L. 871; See Kathryn E. McCollister, *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Programs Evaluation* (2010) 108 Drug & Alcohol Dependence 98; Claire M. Renzetti, *Economic Stress and Domestic Violence* (2009) Center for Research on Violence Against Women Faculty Research Reports and Papers, available at <https://uknowledge.uky.edu/crvaw_reports/1/> (last accessed October 5, 2018); Tanis Day et al., *The Economic Costs of Violence Against Women: An Evaluation of the Literature* (2005) (expert brief for the United Nations); Ted R. Miller et al., Dep't of Justice, Nat'l Inst. of Justice, Victim Costs and Consequences: A New Look (1996).

[viii] See M. Kreisman, United States v. Bryant, *Federal Habitual Offender Laws, and the Rights of Defendants in Tribal Courts: A Better Solution to Domestic Violence Exists* (2017) 39 Campbell L. Rev. 205; Color of Violence: The INCITE! Anthology (INCITE! Women of Color Against Violence ed., 2016); Donna H. Lee, *Intimate Partner Violence Against Asian American Women: Moving from Theory to Strategy* (2015) 28 Colum. J. Gender & L. 315; Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic violence Criminal Jurisdiction Provision of VAWA* (2014) 28 Columbia J. Gender & L. 197; Remla Parthasarathy, *Identifying and Depicting Culture in Intimate Partner Violence Cases* (2014) 22 Buff. J. Gender L. & Soc. Pol'y 71; Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom* (2013) 19 Cardozo J.L. & Gender 147; Shondrah Tarrezz Nash, *Through Black Eyes: African American Women's Construction of Their Experiences With Intimate Male Partner Violence* (2005) 11 Violence Against Women 1423, 1427; Stacey A Guthartz, *Domestic Violence and the Jewish Community* (2004) 11 Mich. J. Gender & L. 27; Leti Volpp, *On Culture, Difference, and Domestic Violence* (2003) 11 Am. U.J. Gender Soc. Pol'y & L. 393; Angela Davis, *The Color of Violence Against Women* (2000) 3 Colorlines 4; Michelle Decasas, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy* (2003) 24 Chicano-Latino L. Rev. 56; Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin* (2001) 16 Wisc. Women's L.J. 259; Nooria Faizi, *Domestic Violence in the Muslim Community* (2001) 10 Tex. J. Women & L. 209; *State v. Vue* (Minn.App. 2000) 606 N.W.2d 719. (several of these sources are excerpted in Lemon, footnote 3.)

[ix] See Federal Agency LEP Guidance for Recipients, Federal Interagency Website, available at <https://www.lep.gov/guidance/guidance_index.html> (last accessed Sept. 2017).

[x] See *Doe v. State* (S.C. 2017) ___ S.E.2d. ____; Sara Qureshi, *Utilizing Florida's Stance on Domestic Violence Laws Regarding Same-sex Couples As an Effective Model for National Uniformity* (2017) 28 U. Fla. J.L. & Pub. Pol'y 143; Ashley LeBrun, *Are We There yet?—VAWA 2013: Same-sex Legal Acceptance* (2015) 39 Seton Hall Legis. J. 101; Catherine Palo, *Same Sex Orders of Protection* (2015) 149 Am. Jur. Proof Facts (3d ed.) 119; Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System* (2013) 48 Harv. C.R.-C.L. L. Rev. 51; Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence* (2012) 27 Berk. J. Gender L. & Justice 198; Joshua D. Talicska, *Out of One Closet and Into Another: Why Abused Homosexual Males Refrain from Reporting Their Abuse and What to Do about It* (2012) 8 Mod. Am. 21; Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-sex Domestic Violence Cases* (2012) 24 St. Thomas L. Rev. 544; *Price-Cornelison v. Brooks* (10th Cir. 2008) 524 F.3d 1103; see also generally *Obergefell v. Hodges* (2015) 576 U.S. ___.

[xi] See Michelle Ballan, *Introduction: Intimate Partner Violence and Individuals with Disabilities* (2017) 22 Domestic Violence Report 33; Michelle Ballan & Molly Freyer, *Help-Seeking among Deaf Female Survivors of IPV* (2017) 22 Domestic Violence Report 33; Doug Jones, *Domestic Violence against Women with Disabilities: A Feminist Legal Theory Analysis* (2007) 2 Fla. A&M U.L. Rev. 207; Judith Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* (Basic Books, 1997) (*Trauma and Recovery*).

[xii] See Gladys McLean & Sarah Gonzalez Bocinski, *The Economic Cost of Intimate Partner Violence, Sexual Assault, and Stalking*, Institute for Women's Policy Research (2017); Asha DuMonthier and Malore Dusenbery, *Intersections of Domestic Violence and Economic Security*, Institute for Women's Policy Research (2016); Cynthia Hess et al., *The Status of Women in the States: 2015*, Institute for Women's Policy Research (2015).

[xiii] See Marilyn Friedman, *Domestic Violence Against Women and Autonomy*, in Applied Ethics: A Multicultural Approach (Larry May ed., 2017) 314; Walter S. DeKeseredy et al., Abusive Endings: Separation and Divorce Violence Against Women (UC Press, 2017); Lenore E. A. Walker, The Battered Woman Syndrome (4th ed., 2016); Lindauer, *Economic Power*, *supra*, at note 9; Marina Angel, *The Myth of the Battered Woman's Syndrome* (2015) 24 Temp. Pol. & Civ. Rts. L. Rev. 301; Kimberly A. Crossman et al., *"He Could Scare Me Without Laying a Hand on Me": Mothers' Experiences of Nonviolent Coercive Control During Marriage and After Separation* (2015) 22 Violence Against Women 454; Kit Kinports, *The Myth of the Battered Woman's Syndrome* (2015) 24 Temp. Pol. & Civ. Rts. L. Rev. 313; Luisa D. Johnson, *Prostitutes as Victims of Domestic Violence: How Can We Provide Services*? (2015) 21 Domestic Violence Report 5; Conner, *Financial Freedom*, *supra*, at note 9; Luisa Johnson, *Jack the Ripper Lives On . . .: The Need to Recognize Prostitutes as Domestic Violence Victims* (2013) 21 Buff. J. Gender L. & Soc. Pol'y 157; Walter S. DeKeseredy et al., *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge* (2004) 9 Aggression & Violent Behavior 675; Edward Gondolf & Ellen Fisher, The Survivor Theory, Battered Women as Survivors: An Alternative to Treating Learned Helplessness (Lexington Books, 1988); Lenore E. Walker, The Battered Woman (1979).

[xiv] See Herman, *Trauma and Recovery*, *supra*, at note 13.

[xv] See Emilio C. Ulloa et al., *The Big Five Personality Traits and Intimate Partner Violence: Findings from a Large, Nationally Representative Sample* (2016) 31 Violence & Victims 1100; Penelope K. Morrison et al., *The Operational Challenges for Batterer Intervention Programs: Results from a 2-*

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[xvi] Everytown for Gun Safety, *Mass Shootings in the United States: 2009-2016*, available at <https://everytownresearch.org/reports/mass-shootings-analysis/> (last accessed October 4, 2018).

[xvii] Carolina Díez, Rachel P. Kurland, Emily F. Rothman, Megan Bair-Merritt, Eric Fleegler , ZIming Xuan, et al. *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015* (2017) 167 Ann. Intern. Med. 536–543.

[xviii] See Nat'l DV Hotline, *Statistics, supra*, at note iii; *Rodriguez v. Zavala* (2017) 188 Wash.2d 586; Jan Jeske & Mary Louise Klas, *Implications for Family Law Practice and the Family Court System (*2016) 50 Fam. L.Q. 123; *Perez, supra*, at note 7; Jacqueline Mabath, *Blaming the Victim?: The Intersections of Race, Domestic Violence, and Child Neglect Laws* (2016) 8 Geo. J.L. & Mod. Critical Race Persp. 355; Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases* (2016) 50 Fam. L.Q. 173; Kelly Gaines Stoner & Lauren van Schilfgaarde, *Addressing the* Oliphant *in the Room: Domestic Violence and the Safety of American Indian and Alaska Native Children in Indian Country* (2016) 22 Widener L. Rev. 239; Allan R. DeJong, *Domestic Violence, Children, and Toxic Stress* (2016) 22 Widener L. Rev. 201; Dana Harrington Conner, *Polyvictimized Children & Intimate Partner Violence: Promoting Healthy Outcomes for Children* (2016) 22 Widener L. Rev. 215, 222; Laurie S. Kohn, *The False Promise of Custody in Domestic Violence Protection Orders* (2016) 65 DePaul L. Rev. 1001; Ruth E. Fleury-Steiner et al., *"No Contact, Except . . .": Visitation Decisions in Protection Orders for Intimate Partner Abuse* (2016) 11 Feminist Criminology 3; Gabrielle Davis, *A Systematic Approach to Domestic Abuse-informed Child Custody Decision Making in Family Law Cases* (2015) 53 Fam. Ct. Rev. 565; *In re Jonathan B.* (2015) 235 Cal.App.4th 115 (*Jonathan B.*); *Gou v. Xiao* (2014) 228 Cal.App.4th 812; Terrence Rogers, *Exposure to Domestic Violence as a Form of Child Abuse under Domestic and International Law* (2013) 34 Women's Rts. L. Rep. 358; *S.M. v. E.P.* (2010) 184 Cal.App.4th 1249; Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children,* 9 J. L. & Fam. Studies 201 (2007); Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father has Perpetrated Violence Against the Mother* (2005) 11 Violence Against Women 1076; Deborah M Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of DV after the Violence Against Women Act of 2000* (2004) 13 Colum. J. Gender & L. 101; Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?* (2001) 28 Wm. Mitchell L. Rev. 601.

[xix] See April M. Zeoli et al., *Post-Separation Abuse of Women and Their Children: Boundary-setting and Family Court Utilization among Victimized Mothers* (2013) 28 J. Family Violence 547; Safe at Home Program, available at <http://www.sos.ca.gov/registries/safe-home/about-safeathome/> (last

accessed Sept. 2017); Fam. Code, §§ 6300, 6302, 6303, 6381, 6383, 6384 & 6385; Civ. Code, §§ 1941.5 & 1941.6; Cal. Rules of Court, rule 5.215(h).

[xx] See Justine A. Dunlap, *Soft Misogyny, The Subtle Perversion of Domestic Violence "Reform" (*2016) 46 Seton Hall L. Rev. 775; Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative* (2015) 21 Wm. & Mary J. of Women & L. 379; Claire Houston, *How Feminist Theory Became (Criminal) Law: The Path to Mandatory Criminal Intervention in Domestic Violence Cases* (2014) 21 Mich. J. Gender & L. 217; Virginia H. Murray, *A Comparative Survey of the Historical Civil, Common, and American Indian Tribal Law Responses to Domestic Violence* (1998) 23 Okla. City U.L. Rev. 435; Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Partner Violence against Women* (1997) 33 Willamette L. Rev. 773; Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy* (1996) 105 Yale J.L.J. 2117.

[xxi] See generally The Duluth Model, *Wheels*, available at <https://www.theduluthmodel.org/wheels/> (last accessed Sept. 2017). Other sources are provided in the graphics themselves.

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CHAPTER 2

FAMILY LAW[1]

A. RESTRAINING ORDERS

Attorneys representing victims of domestic violence often ask judges to issue, interpret, and enforce restraining orders originating from domestic violence cases. In addition, judges are on-call 24 hours a day, 7 days a week, to respond to telephonic requests from law enforcement personnel for Emergency Protective Orders. Your local police or sheriff's department can tell you about the process for accessing this emergency relief in your county.

1. Effectiveness of Restraining Orders

A study of 285 domestic violence victims who had obtained civil protection orders in three different U.S. cities found that two thirds of the orders were not violated within six months.[2] The study concluded that "the effectiveness of civil protection orders is inextricably linked to the quality of the system of government and community services in which protection orders operate."[3]

In a study of 2,691 battered women in Seattle Washington over a 12-month period, women who had a permanent civil protection order had an 80% reduction in risk of police-reported violence as compared with women who did not have a civil protection order.[4] Researchers also found that "[p]ermanent, but not temporary, protection orders are associated with a significant decrease in risk of police-reported violence against women by their male intimate partners."[5] In a follow-up study, the same researchers found that women with civil protection orders who maintained them over the course of the study were substantially less likely to experience forms of abuse, including a decrease in perpetrator contact, threats, violence, and injury.[6]

[1] The development of this product was supported in part by funding awarded by the United States Department of Justice, Victims of Crime Act, 2015-VA- GX-0058, through the California Governor's Office of Emergency Services.
[2] Susan L. Keilitz et al., Nat'l Center for State Courts, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1997).
[3] *Id.*
[4] V.L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 589, 593 (2002).
[5] *Id.* at 589.
[6] V.L. Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24(1) AM. J. PREVENTIVE MEDICINE 16, 18-20 (2003).

2. Domestic Violence Prevention Act: Restraining Orders

The restraining order most familiar to practitioners in the domestic violence arena is the Domestic Violence Prevention Act (DVPA) restraining order. The DVPA, codified at Family Code section 6200 et seq., was first enacted in 1979 in the Code of Civil Procedure, and then moved to the new Family Code in 1993.

Note that the term "TRO" or Temporary Restraining Order, is used in this manual to refer both to *ex parte* orders (true TRO's) and to those issued after a hearing under the DVPA.

a. Qualifying for a TRO

Under Family Code section 6203 to get relief, the victim must establish that the offender has committed an act of abuse toward the victim.[7] "Abuse" is defined as intentionally or recklessly causing or attempting to cause bodily injury, sexual assault, placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or engaging in any behavior that has been or could be enjoined under Family Code section 6320 (e.g., molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, destroying personal property, directly or indirectly contacting, coming within a specified distance of or disturbing the peace of the protected person or, on showing of good cause, their family member, household member, or pet).[8]

Family Code section 6320 does not require an allegation of actual infliction of physical injury or assault. "Certain types of nonviolent conduct, such as contacting the other party and disturbing the peace of the other party, can constitute abuse under 6320. Disturbing the peace, within the meaning of 6320, means conduct that destroys the mental or emotional calm of the other party."[9]

The victim must also establish that the defendant is either:

- a current or former spouse
- a current or former cohabitant (i.e. the parties live together or have lived together as a household)[10]
- the co-parent of the victim's child

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[7] Some clients may also be able to obtain protective orders under Elder Abuse and Dependent Adult Civil Protection Act (CAL. WELF. & INST.CODE, § 15600 et seq.). The victim must prove by the preponderance of the evidence (51%) that he or she is entitled to a protective order. Bookout v. Nielsen, 155 Cal.App.4th 1131 (2007).

[8] A protected pet can belong to the victim, a child, or the defendant himself. The court can require that the victim obtain exclusive care, possession, and control of the pet and require the batterer to stay away from the pet. CAL. FAM. CODE section 6320(b).

[9] In re Marriage of Nadkarni,173 Cal.App.4th 1483 (2009), which held that destroying the mental or emotional calm of the other party could include causing the party to suffer embarrassment and fear by accessing, reading, and publicly disclosing the content of her confidential emails.

[10] *See* discussion *supra* Chap. 1, Part (C)(2).

- related in some other way by blood, marriage, or adoption[11]

- in a current or former, dating or engagement relationship with the victim[12]

- relief is also available under Family Code section 6211 if the victim is a child of a party or a child who is the subject of a paternity action, where the presumption applies that the male parent is the father of the child to be protected

PRACTICE TIP

Note that the Domestic Violence Prevention Act includes roommates, gay and lesbian relationships, and minors (principally teenagers). Plaintiffs age twelve and older filing for an order against a boyfriend or girlfriend do not need a *Guardian ad litem*.[13] If the plaintiff is under age twelve or is filing the action against a non-boyfriend or girlfriend, and is not emancipated by court order, married, or a member of the Armed Services, she or he must file the action through a *Guardian ad litem*. This person can be any adult, but is usually the minor's parent.

Also note that if the court includes provisions regarding custody, visitation or support in a protection order, these survive the termination of the order.[14]

b. Purpose of the TRO under the DVPA

The purposes of a TRO, according to Family Code section 6220, are "to prevent the recurrence of acts of violence 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."

c. Relief available under the DVPA: Family Code sections 6320-34

The relief available pursuant to a TRO under the DVPA includes:

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[11] Note that this is limited to relatives within the second degree, i.e. parent, child, sibling, grandparent, or grandchild. If the defendant is a more distant relative, the victim may proceed under the Civil Harassment Act, as discussed *infra*.

[12] In *Oriola v. Thayer*, 84 Cal. App. 4th 392 (2000), the court held that the plaintiff did not qualify for a DVPA order since her social time with the defendant did not constitute a "dating relationship." Without mentioning the definition of "dating" for domestic violence purposes in the Penal Code, the court limited "dating" to a "serious courtship" with "reciprocally amorous and increasingly exclusive interest in one another, and shared expectation of the growth of that mutual interest, that has endured for such a length of time and stimulated such frequent interactions that the relationship cannot be deemed to have been casual." As of January 1, 2002, presumably in response to the *Oriola* court's very narrow definition, Family Code section 6210 now defines "dating relationship" to mean "frequent intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations." This is the same definition used in Penal Code section 243(f)(10).

[13] CAL. CIV. PRO. CODE § 372 (2019). However, when filing for other types of orders, minors 12 and older must be accompanied by a guardian ad litem to petition for or oppose a protection order. CAL. CIV. PRO. CODE § 527.6 (2019).

[14] CAL. FAM. CODE § 6340 (2019); CAL. FAM. CODE § 6323 (2019).

- ordering the abuser not to contact (directly or indirectly, by mail or otherwise), molest, attack, batter, strike, stalk, sexually assault, threaten, harass, telephone (including annoying phone calls violating Penal Code section 653m), destroy personal property, or disturb the peace of the victim or, on a showing of good cause, another named family member or pet;[15]

- requiring the abuser to stay a certain number of yards away from the victim;[16]

- ordering the eviction of the abuser from the home and giving the victim the right to remain in the home;

- awarding temporary custody of any minor children and providing for visitation unless, a judge determines it is not in the best interest of the child;[17]

- ordering child support for any children (although in some counties the judge will require that the parties deal with this issue through a dissolution/legal separation or paternity action);

- providing for possession and return of personal property such as a car, bike, keys, and appliances;

- providing for payment of debts coming due while the order is in effect (e.g., mortgage and credit cards);

- ordering the abuser to pay restitution to the victim for costs she has incurred as a result of the violence (e.g., motel, bus ticket, broken possessions, lost wages, and medical bills);

- ordering restitution to a shelter, or other domestic violence program utilized by the victim;

- ordering the restrained party to obtain counseling (e.g., probation-approved batterers' counseling, drug/alcohol counseling); the court can also order that the minor children receive counseling; and

- awarding costs and attorney's fees to the prevailing party.

Note: A sole custody order made in a domestic violence restraining order under the DVPA is

[15] CAL. FAM. CODE § 6320 (2019).
[16] *Id.* (ranging from 25 to 200 yards, depending on local practice).
[17] *Note* that a non-parent party has no right to custody or visitation of the other party's child under the DVPA. Barkaloff v. Woodward, 47 Cal. App. 4th 393 (1996). Courts should extend protection granted to children under a temporary restraining order when they grant a permanent restraining order protecting the mother when the respondent is the alleged father of the children, even where there is no proof of paternity. Gonzalez v. Munoz, 156 Cal. App. 4th 413 (2007). Additionally**,** Family Code section 6323 allows visitation orders under specified conditions when the parties are not married but are co-parents.

not a "final custody determination." Courts must apply the "best interests" rule to move-away requests in these cases, rather than the "changed circumstances" standard.[18]

d. Firearms

Upon issuance of a protective order, the court shall order the batterer to relinquish all firearms. The batterer is prohibited from owning, possessing, purchasing, or receiving a firearm while the protective order is in effect.[19] The defendant must immediately surrender any firearm upon request of a law enforcement officer. If no request is made by a law enforcement officer, the relinquishment must occur within 24 hours of being served with the order, by either surrendering it to a law enforcement officer or selling it to a licensed gun dealer.[20] The authorized person who takes possession of the firearm must issue a receipt to the defendant. The defendant must then file these receipts with the issuing court within 48 hours of being served with the order.[21] Failure to timely file a receipt is a violation of the protective order.[22]

e. A Restraining Order is Not . . .

A restraining order is not an absolute guarantee of protection, and will not order a police officer as a personal bodyguard for the victim's safety. In other words, there are some situations in which the victim's time and energy may be better spent moving to a permanent secret location, particularly when the abuser has threatened to kill her and she believes he is likely to do so.

f. DVPA Forms

The following forms are used in California. All directions on the forms must be read carefully before filling them out for restraining orders. The person filling out the forms is the plaintiff, and the person accused of abuse is the defendant.[23]

Family Code section 6225 does not require the plaintiff to state her exact address or the addresses of her school, employment, the child care center, etc., in an effort to protect the victim and her children.

Note: Code of Civil Procedure section 185 requires that all such forms be made available in languages other than English, as the Judicial Council deems appropriate. Forms are available in English, Chinese, Korean, Spanish, and Vietnamese.[24] If your client does not read English but speaks or reads one of the languages where a form is provided, it is advisable to fill out the forms both in English and in the other language, and then attach the non-English version as an appendix to the English one. This way, the law enforcement can read the English version, and

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[18] Keith R. v. Superior Court, 174 Cal. App. 4th 1047 (Cal.App., 2009)
[19] CAL. FAM. CODE § 6304(f) (2006). *See generally* Michelle N. Deutchman, *Getting the Guns: Implementation and Enforcement Problems with California Senate Bill 218*, 75 S. CAL. L. REV. 185 (2001).
[20] CAL. FAM. CODE § 6304 (2019).
[21] *Id.* The text of the 2006 version of the statute requires the defendant to file the receipt within 48 hours of being served with the order, rather than 72 hours in the 2004 version.
[22] CAL. FAM. CODE § 6304((2019).
[23] Forms are available online at www.courtinfo.ca.gov/cgi-bin/forms.cgi.
[24] *Id.*

the client can (hopefully) read the non-English version.

- **Resource List of Local Referrals**
  Under Family Code section 6343(b), the court is required to develop and hand out a resource list of local referrals for anyone applying for a restraining order. If this is not happening at your local court, it is recommended that you investigate the situation and attempt to remedy it.

- **Application and Declaration for DVPA Restraining Order**
  This form tells the judge the facts of the plaintiff's situation, including the names of the parties, the specific acts of violence alleged, and the names of any children in the home. It also informs the judge what the plaintiff wants the judge to order.

- **Order to Show Cause and Temporary Restraining Order (OSC/TRO)**
  The plaintiff also fills out the Order to Show Cause and Temporary Restraining Order (OSC/TRO), and submits the requested order to the judge with the Application. The *ex parte* Temporary Restraining Order (TRO) is granted based only on the plaintiff's written statement of facts.

  After the judge signs it, the OSC/TRO is served on the defendant with the Application and Declaration. It advises the defendant that a hearing has been scheduled and gives the time and date, usually within 20-25 days from the date the judge signed the TRO. It also advises the defendant of the terms of the temporary order, which go into effect as soon as the judge signs the OSC/TRO. This includes relinquishing any firearms.

- **Order After Hearing**
  The OSC/TRO expires at the hearing. The plaintiff should fill out the Order After Hearing before the hearing, and bring it with him or her to the court date so that the judge can sign it at the hearing or immediately thereafter. Care should be taken to include everything the plaintiff is seeking (e.g., specific visitation schedule, limits on visitation, orders regarding counseling, restitution, child support, property control, etc.). The plaintiff will have to make any changes ordered by the judge before it will be signed. As stated below, the order can have a duration of up to 5 years.[25] Upon the request of the victim, the order may be renewed for five years or permanently without further showing of abuse.[26]

- **Application for Waiver of Court Fees and Costs**
  This form should be filled out if the plaintiff needs the sheriff or marshal to serve the defendant (deliver the papers to the defendant) and does not have the money to pay the service fees.[27] This form is both a statement that says the plaintiff cannot pay the fees and a request that the fees be waived. Service is free if the defendant is in custody.[28]

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[25] CAL. FAM. CODE § 6345(a) (2019).
[26] *Id.*
[27] Application for Waiver of Court Fees and Costs (Form FW-001), available from www.courtinfo.ca.gov. (last visited 8/22/10).
[28] CAL. GOV'T CODE § 26721 (2019).

- **Filing Fee Automatically Waived**
  There is no filing fee for the an application, a responsive pleading, or for any other pleading which seeks to obtain, modify, or enforce a protective order or other order that is necessary to obtain or give effect to a protective order.[29]

  In other words, if the TRO is filed as part of a divorce, there is no filing fee for the TRO itself. Nor is there a filing fee if the application is seeking to modify custody, visitation, or support an existing TRO.

- **If the judge denies the request for a temporary restraining order . . .**

  - **The judge should give reasons why.**

  Family Code section 6320.5 requires that a judge who denies an *ex parte* order for domestic violence must include the reason for denying the petition. Additionally, any order denying a jurisdictionally adequate petition for an *ex parte* order must provide the petitioner the right to a noticed hearing. This section codified the 2007 decision in *Nakamura* v. *Parker*, in which the California Court of Appeal held that a judge who denies a request for a temporary restraining order should give specific reasons why. The Court found that failing to state the reasons for rejection would lead the abuser to think that the law does not protect the victim. "Thus, the failure of the court to provide *any* reason for its summary denial of the requested protective order may well stimulate continuing domestic abuse . . ." 156 Cal. App. 4th 327, 336 (2007). For the CPEDV amicus brief, visit www.law.berkeley.edu/domesticviolencepracticum.htm, choose Student Writing, then Nakamura case.

  - **The judge cannot deny TROs because of bias against undocumented victims.**

  In *Quintana v. Guijosa*, 107 Cal. App. 4th 1077 (2003), the California Court of Appeal found that a judge was wrong to deny a woman's request for a restraining order. The judge stated that the woman should return to Mexico to be with her children rather than seek protection from a U.S. court. The Court of Appeals stated, "Given all this, the trial court's comments were not merely legally unsound, but offensive, and ignored the fact that the law affords its protections to all the people described in the statutes, not just those individuals whose choices please the trial court."[30]

- **Motion to Recuse on Basis of Bias**

  Note that if you are assigned to a judge who you already have reason to believe is biased against your client, or against victims of domestic violence generally, you have the right to ask that the judge be removed from the case. To do this, file a Motion to Recuse on Basis of Bias based on California Code of Civil Procedure section 170.6. You must do this before any rulings are made.

g. Duration of a Restraining Order under DVPA

[29] CAL. FAM. CODE § 6222 (2019).
[30] 107 Cal. App. 4th at 1079.

Family Code section 6345 provides that DVPA restraining orders are valid for up to twenty days before the hearing (25 days if good cause is shown), and then for a fixed period of time not to exceed five years after the hearing, unless terminated or extended by order of the court. The parties can stipulate to permanent orders, or the orders can be renewed without a showing of further abuse for an indefinite period by filing another Application/Declaration under the original case number.[31] If the Order After Hearing has no expiration date, it is in effect for three years.[32]

Upon finding that renewal of a protective order is warranted, the court may renew the order under section 6345 for either five years or permanently, but not for a period of time less than five years.[33]

h. Steps to Obtain a Restraining Order (both temporary and permanent)

Step 1: Get forms from the Superior Court clerk or from court website.

Step 2: Fill out forms clearly and legibly. Typing is preferred, but some courts will accept hand-written documents. When preparing the forms or drafting a declaration, it is helpful and important to, where possible, attach documentation or evidence. A victim or personal representative of a victim of domestic violence may obtain copies of domestic violence incident report(s) from law enforcement. Personal representatives include victim's attorney, guardian, conservator, and immediate family members.[34]

Step 3: Make several copies (court keeps original; copies are for plaintiff, defendant, all police departments that might be involved, school, child care workers, etc.).

Step 4: Get case number from Superior Court clerk.

Step 5: Leave original and all copies of Application and Declaration, and OSC/TRO, with judge's clerk (or wait) for the judge's signature. If plaintiff is requesting a Fee Waiver for service, also leave these forms with the clerk. Return later that day or next day to pick all of these forms up. The plaintiff does not have to appear before the judge at this stage. An *ex parte* order must be issued or denied on the same day that the application is submitted to the court, unless the application was filed too

[31] *See* Donaldson v. Donaldson, 2008 WL 1795252 (Cal. App. 4 Dist) (in an unpublished decision, $7,000 in attorney fees ordered as sanction against *in propria persona* attorney-husband, for engaging in discovery tactics intended to "work over" the wife and "frustrate the policy of the law to promote settlement of litigation," in wife's motion to renew restraining order).
[32] CAL. FAM. CODE § 6345 (2019).
[33] *See* Avalos v. Perez, 2011 Cal. App. 4th 754 (Cal. App. 1st Dist. May 25, 2011), holding that while the court has discretion to determine the length of the initial order, the statutory language authorizing an extension of the order omits the "not more than" language, therefore requiring the extension be either five years or permanently.
[34] CAL. FAM. CODE § 6228 (2019).

late in the day, in which case the order will be dealt with on the next day of judicial business.[35]

Step 6: Have defendant served (by sheriff, marshal, process server, or friend); and have server fill out Proof of Service. This document comes in the packet from the Superior Court.

Step 7: If defendant is not served in time before the hearing, fill out Reissuance Form and repeat steps 3, 5, and 6.

Step 8: Give copies of OSC/TRO and Proof of Service to all police departments that might be involved. Plaintiff should keep copies of these two documents with him or her at all times.

Step 9: Have plaintiff complete Order After the Hearing forms before the hearing and have plaintiff bring the forms with him or her to the hearing.

Step 10: Attend the hearing.

i. What to Expect at the Restraining Order Hearing

- **If one of the parties needs an interpreter**, Evidence Code section 754 provides that a free certified interpreter shall be provided in all legal proceedings by the court for anyone who is deaf or hearing impaired. The Americans with Disabilities Act also requires this. Evidence Code section 755 provides that in restraining order cases (issued under the DVPA, UPA, or Family Law Act), each party is entitled to a free certified interpreter if she or he does not speak English and is indigent. In some counties, the litigant must file a Fee Waiver to request that the court pay the interpreter fee.

- **The hearing is held 20-25 days from the date the TRO is signed by the judge**.[36] At this hearing, the defendant is ordered to show cause why the order should not continue for 5 years. At the discretion of the judge, the plaintiff may also be asked to prove that the defendant abused or threatened to abuse her or the children, and that protection and the other things asked for in the application and declaration (custody, support, or possession of the home or vehicle) are needed.

- **If the plaintiff is unrepresented**, he or she may ask a support person to accompany him or her to the counsel table during the hearing.[37] This person is prohibited from prompting, influencing, or swaying the plaintiff. The support person can be anyone the plaintiff chooses (e.g., victim advocate, friend, or relative). The role of the support person is to provide moral support to the plaintiff. Some judges will allow the support

[35] CAL. FAM. CODE § 6326 (2019).
[36] If the temporary restraining order was granted without the presence of the defendant (ex parte), defendants can ask for more time, called a "continuance" before a permanent restraining order is granted. Ross v. Figueroa, 139 Cal.App.4th 856 (2006).
[37] CAL. FAM. CODE § 6303(d) (2019).

person to write notes to the plaintiff during the hearing (e.g., if the plaintiff forgets to ask for something); other judges require that the support person not communicate with the plaintiff during the hearing itself. (*See* Appendix G for information on the Unauthorized Practice of Law).

- **If the defendant does not come to the hearing,** the order will be granted automatically. However, the plaintiff then has to have the defendant served with the Order After Hearing, and then needs to file the Proof of Service with the court and the police. The defendant does not need to be served personally again with the Order After Hearing if it is identical to the temporary order. However, if the defendant did not appear at the hearing, personal service is probably necessary in the event it is necessary to obtain a conviction under Penal Code section 273.6 for violation of the order.

- **It is rare in California that a judge will hold a full evidentiary hearing for a restraining order,** with witnesses and other evidence. However, in case this should arise (e.g., if the defendant's attorney requests such a hearing), the plaintiff may want to bring any witnesses who can attest to the abuse inflicted or injuries suffered by the plaintiff. The plaintiff and any witnesses may be questioned by the judge, the plaintiff, the plaintiff's attorney, and/or the defendant's attorney. At this hearing, the defendant will probably also be allowed to tell his side of the story.

- **Family courts are required to receive live testimony** at a hearing in any family law matter unless there is a good cause or a stipulation by parties.[38]

- If a parent and child relationship is not established at the hearing, custody or visitation may be denied; however, the court may accept a stipulation by the parties and enter judgment on the issue of paternity.[39]

- **At the end of the hearing** (i.e., after hearing both sides and reviewing all the evidence, if this is the local practice), the judge will decide if the ex parte order should be continued, canceled, or changed and whether to enter an Order After Hearing. The order will say what protection or relief has been granted. If no time period is noted, it is in effect for 3 years.

- **If the plaintiff has no attorney,** he or she must prepare the Order After Hearing for the judge to sign. This entails making notes of what the judge orders during the hearing, or checking with the judge's clerk to make sure the Order After Hearing reflects the correct orders, and then typing or writing these orders onto the form. A copy of the order should be given to each party and to the police or sheriff's department where the plaintiff and/or defendant resides, as well as anyone else who is involved (e.g. school, day care, other relatives, employer). The plaintiff should also keep one copy of the Order After Hearing (and Proof of Service, if defendant was not present at the hearing) with him or her at all times.

[38] CAL. FAM. CODE § 217 (2019).
[39] CAL. FAM. CODE § 6323 (2019).

j. Service of the Pleadings

(1) Personal Service Under Family Code section 6383

(a) The defendant must be personally served with a copy of the Application and Declaration, and the OSC/TRO, before the hearing. While Family Code section 243(c) requires the papers to be served at least 15 days prior to the hearing if notice was given to the respondent before the TRO was granted, subdivision (b) of the same section states that service must be accomplished only 5 days before the hearing if there was no notice given earlier. In either case, the court may shorten time for service even further. It is standard practice in many counties to shorten service time to two days, in order to better protect victims and give them more time to locate the defendant.[40] These papers can be served by any adult who is not named in the order, including the sheriff, marshal, a professional process server, or a friend or relative of the victim.[41] Service by the sheriff or marshal is free if the defendant is in custody[42] or if the plaintiff qualifies for a Fee Waiver from the court.[43]

(b) It sometimes happens that the defendant has not yet been served with the order before another domestic violence incident occurs. In this situation, if a law enforcement officer is called to the incident, and the plaintiff requests service of the order, the officer is required to serve the defendant. It is recommended that the officer do this even if the plaintiff has only one copy of the order, as the plaintiff can obtain another copy for himself or herself later from the court clerk or her attorney. The plaintiff should also give the officer a Proof of Service to sign (at the same time or shortly thereafter). As soon as the defendant is served, he or she must comply with the order (i.e., leave the premises), and the officer must enforce the order (i.e. arrest defendant if he or she refuses to leave).

(2) Civil Standby

The plaintiff may request that the sheriff or other law enforcement officers accompany the plaintiff to reclaim possession of the house and to evict the defendant or to reclaim clothing, a vehicle, or other property. This is called a

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[40] CAL. FAM. CODE § 243(f) (2019).

[41] A petitioner who is a participant in the Safe at Home program may request that the sheriff or marshal notify her by telephone or other electronic means within 24 hours after service of process of an order or injunction relating to domestic violence. CAL. GOV'T CODE § 6103.3.

[42] CAL. GOV'T CODE § 26721 (2019).

[43] Application for Waiver of Court Fees and Costs (Form FW-001) is available at www.courtinfo.ca.gov (last visited 8/22/10).

"civil standby."[44]

(3) Service by Registered or Certified Mail or by Publication

If the defendant cannot be found in order to be served by personal delivery, then registered or certified mail or service by publication is authorized by law.[45] However, these methods are *not recommended* because in order to be arrested for a violation, or held in contempt, the defendant must have received personal notice. Service by mail and service by publication do not constitute actual notice. Unfortunately this means that if the plaintiff cannot locate the defendant after several reissuances of the temporary order, she is unable to proceed further.

Service by publication consists of publishing a notice of service of process once a week for three successive weeks in a qualified newspaper reasonably calculated to be circulated in the area where the party is believed to be located or in a newspaper in the county where the action is pending.[46]

3. Types of Restraining Orders, Enforcement

a. DVPA Orders: Family Code section 6200 et seq.

DVPA restraining orders are enforceable under Penal Code section 273.6, as well as Penal Code section 166(a)(4), prohibiting violation of a court order, and Code of Civil Procedure section 1209, contempt of court. (*See* Chapter 2, section (A)(1)(d), and (e) for more details).

The DVPA in Family Code section 6300 and the Elder Abuse Act in Welfare & Institutions Code section 15657.03 require a showing of past abuse, not a threat of future harm. A protective order under the Elder Abuse Act may issue on the basis of past abuse, without any particularized showing that the wrongful acts will be continued or repeated,[47] and may also issue against unrelated abusers. Elder abuse orders may be brought by a conservator or other authorized persons.

Welfare and Institutions Code section 4427.5 provides for inter-agency cooperation in producing and updating training manuals that deal with elder abuse and neglect.

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[44] California Courts Website, *Self-Help Center: Domestic Violence & the Criminal Justice System - Police*, http://www.courtinfo.ca.gov/selfhelp/protection/dv/respolice.htm#civil (last visited July 1, 2009) ("Anyone can call the police and ask them to be present for a limited time to keep the peace. This is called a 'civil standby' and is often used when a person needs to collect clothing or property from their home after a domestic violence incident.").

[45] CAL. FAM. CODE § 6384(a) (2019) ("If a person named in a temporary restraining order or emergency protective order is personally served with the order and notice of hearing with respect to a restraining order or protective order based thereon, but the person does not appear at the hearing either in person or by counsel, and the terms and conditions of the restraining order or protective order are identical to the temporary restraining or emergency protective order, except for the duration of the order, the restraining order or protective order may be served on the person by first-class mail sent to that person at the most current address for the person available to the court.") (applies only after the hearing); *see also* Judicial Council Form No. DV-250 (Proof of Service by Mail), www.courtinfo.ca.gov (last visited 8/22/10).

[46] *See* CAL. CODE CIV. PROC. § 415.50

[47] Gdowski v. Gdowski (2009) 175 Cal. App. 4th 128

b. Emergency Protective Orders (EPO's): Family Code sections 6240-6273

As stated previously in Chapter 2, Emergency Protective Orders (EPO's) are used to prevent an immediate and present danger of violence against an adult or child from a family or household member, or an immediate and present risk of a child being abducted by a parent or relative.[48] The victim must be able to articulate the present circumstances which put her well-being, or that of her children, in imminent harm. EPO's are valid for five business days, or seven calendar days. An EPO can be initiated only by a law enforcement officer. After presenting the facts and getting telephone authorization from a judge, the officer fills out the form for the victim and provides her with a copy. Another copy is served on the defendant, if he can be found. A third copy is kept by the dispatcher. The original is supposed to be filed with the court by the law enforcement agency. Enforcement of EPO's is identical to enforcement of DVPA orders.

c. Uniform Parentage Act (UPA) Orders: Family Code sections 7710, 7720, and 7730

This Act applies when the parties are not married but have a child in common. Generally, each parent has equal rights to the child and equal responsibilities to support the child. See generally Family Code sections 7600 et seq.

Authority for the issuance of restraining orders under the UPA orders arise out of Family Code sections 7710 (ex parte), 7720 (after a hearing), and 7730 (part of a judgment). Their duration and enforcement is the same as orders under the DVPA.

Several decisions have held that the UPA could apply to homosexual co-parents.[49] However, in most cases such parties would file a DVPA order, as they would usually be current or former cohabitants.

d. Family Law Act (FLA) Orders: Family Code section 2047

Family Law Act orders are issued in dissolutions or legal separations, under Family Code section 2047. Their duration and enforcement is the same as orders under the DVPA.

e. Civil Harassment Prevention Act Orders: Code of Civil Procedure section 527.6

Orders under the Civil Harassment Prevention Act are valid for up to 21 days before the hearing, or, if the court extends the time for the hearing,[50] not to exceed 25 days,[51] and up to 3 years after the hearing. These orders are used if the relationship between the parties does not fit the narrower definitions required for DVPA, UPA, or FLA orders, or if they are very casual dating relationships which do not fit the definition of 'dating relationship' in Family Code section 6210, discussed above. This type of order would be used when the relationship between the parties is

[48] CAL. FAM. CODE § 6250 (2019).
[49] K.M. v. E.G., 37 Cal.4th 130 (2005); Elisa B. v. Superior Court, 37 Cal.4th 108 (2005).
[50] CAL. CODE CIV. PROC. § 527.6(g) (2019).
[51] CAL. CODE CIV. PROC. § 527.6(f) (2019).

that of more distant relatives (e.g., aunt, uncle, niece, nephew, cousin, great-grandparent, great-grandchild, etc.), co-workers, roommates who are not emotionally involved, or neighbors. These orders are virtually identical to DVPA restraining orders except that they are issued under different statutes, and contain fewer types of provisions (e.g., no custody or child support). They also differ from DVPA restraining orders in that minors 12 and older must be accompanied by a guardian ad litem to petition for or oppose a protection order.

Civil Harassment orders are enforced the same as DVPA orders. Similarly, courts may re-issue Civil Harassment protection orders if not served within the statutory time frame, respondents must relinquish all firearms, petitioners should not be charged fees for service, and courts may transmit orders to law enforcement so they may enter them into the California Law Enforcement Telecommunications System (CLETS).

f. Workplace Violence Safety Act Orders: Code of Civil Procedure section 527.8

Orders issued under the Workplace Violence Safety Act are initiated by employers to protect one of their employees from threats or violence by any individual, including other employees. This restraining order applies to the entire workplace, not just the one employee. Respondents are prohibited from knowing the address or location of persons protected by the order.[52] These orders last for 21 days before the hearing, and up to 3 years afterwards. Their enforcement is the same as that for DVPA orders.

g. Criminal Court Orders: Penal Code section 136.2(a)

Criminal courts may issue their own orders in domestic violence cases, under Penal Code section 136.2(a), prohibiting the intimidation of a victim or witness. In fact, this Penal Code section requires that the file be marked "domestic violence" so that the court may consider issuing a protective order on its own motion in every domestic violence case. These orders continue as long as the criminal court has jurisdiction, so there is no specific expiration date and they may last several years (e.g. during incarceration and probation or parole). Criminal court orders, often called "stay-away orders," are enforceable under Penal Code section 166(c).[53]

h. Juvenile Court Orders: Welfare and Institutions Code section 213.5, 304, 362.4, and 726.5

The juvenile court is authorized to issue protective orders under three circumstances:

- when a petition has been filed requesting that a minor be made a dependent of the court;[54]
- once the court orders that the minor be made a dependent;[55] and

[52] CAL. CODE CIV. PROC. § 527.10 (2019).
[53] *See supra* Chap. 2, Part A(1)(d)(6).
[54] CAL. WELF. & INST. CODE § 213.5 (2019).
[55] CAL. WELF. & INST. CODE § 304 (2019).

- when the juvenile court completes the case and makes "exit orders".[56]

The first two types of orders last for 15 days before the hearing (20 days if good cause is shown), and up to 3 years after a hearing. The exit orders last until further order of the court. Juvenile court orders are enforceable under Penal Code section 273.65.

Juvenile courts can also issue restraining orders in juvenile delinquency cases, under Welfare and Institutions Code section 726.5. These also last for up to three years and are also enforceable under Penal Code section 273.65.

i. Post-Conviction Stalking Orders: Penal Code section 646.9(j)

Post-conviction orders in stalking cases may be in effect for up to 10 years. These orders are enforceable under either Penal Code section 166(c) (violation of criminal restraining orders in domestic violence cases) or under the more general Penal Code section 166(a)(4) (violation of any court order).

j. Private Post-Secondary Institutions Restraining Orders: Code of Civil Procedure section 527.85

When a student has suffered a credible threat of violence, Code of Civil Procedure section 527.85 allows for officials of educational facilities such as schools, colleges, universities, or technical institutes to file for one restraining order on behalf of students, volunteers and employees. A restraining order can be extended to encompass an entire campus, including students, volunteers, and staff.

[56] CAL. WELF. & INST. CODE § 362.4 (2019).

k. Table of Restraining Orders in California

Type of Order	**Statute**	**Ex Parte Duration**	**Duration After Hearing**	**How Enforced** Note: Cal. Pen. Code §166(a)(4) & Cal. Code Civ. Pro. §1209 also apply
Emergency Protective Order	Family Code §§ 6240-73	5 business days or 7 calendar days	Not applicable	Penal Code § 273.6
Domestic Violence Prevention Act	Family Code § 6200 et seq, see especially § 6218	20 days, or 25 if good cause is shown	Initially 5 years; when renewed can be permanent	Penal Code § 273.6
Uniform Parentage Act	Family Code §§ 7710 and 7720	20 days, or 25 if good cause is shown	Initially 5 years; when renewed can be permanent	Penal Code §273.6
Family Law Act	Family Code § 2047	20 days, or 25 if good cause is shown	Initially 5 years; when renewed can be permanent	Penal Code § 273.6
Civil Harassment Prevention Act	Code of Civil Procedure § 527.6	21 days, or 22 if good cause is shown	3 years	Penal Code § 273.6
Workplace Violence Safety Act	Code of Civil Procedure § 527.8	21 days	3 years	Penal Code § 273.6
Post-Conviction No-Stalking Order	Penal Code § 646.9(j)	Not applicable	Up to 10 years	Penal Code § 166(c), § 166(a)(4)
Criminal Court orders	Penal Code § 136.2(a)	Until court no longer has jurisdiction	Until court no longer has jurisdiction or 10 years upon PC 273.5 conviction even if sentenced to prison.	Penal Code § 166(c)
Juvenile Court orders	Welfare & Institutions Code §§213.5, 304, 362.4, 726.5	15 days, or 20 if good cause is shown	3 years, if part of exit order, until further order of the court	Penal Code § 273.65

4. Conflicts Between Orders

In some cases, there are pending criminal charges or simultaneous juvenile proceedings at the time the plaintiff requests a civil restraining order. California Rule of Court 804 requires that civil attorneys inform the court of any other proceedings involving the same parties. Thus it is advisable to routinely ask the client if there are any orders already issued by other courts.

In terms of the hierarchy of enforcement, Emergency Protective Orders come first if the orders involve the same people protected and restrained, and contain provisions more restrictive than the provisions of the other restraining order.[57] Otherwise, criminal court orders come first, then juvenile court orders, then family court (DVPA) and other civil orders (harassment, workplace abuse, etc.)[58]

Since criminal and juvenile orders take priority over civil orders,[59] it is recommended that the civil court issue orders consistent with the criminal or juvenile orders.[60] Additionally, when charges are pending and the defendant wishes to oppose civil orders, it is often best for the court to advise the defendant of his or her Fifth Amendment rights and continue the orders past the criminal court date, postponing the civil hearing until then.

5. Double Jeopardy

Another issue which sometimes arises is double jeopardy, where the defendant has been found in criminal contempt for violating a restraining order, and later is prosecuted for the same act. The general rule is that the double jeopardy bar applies if the two offenses for which the defendant is punished or tried cannot survive the "same-elements" or "*Blockburger*" test.[61]

6. Firearms Restrictions on Defendants/Respondents in Restraining Orders Issued under DVPA

a. State Law

California law automatically prohibits anyone named as a defendant or respondent in a DVPA restraining order from acquiring more firearms.[62] The court must also order the defendant to give up to law enforcement, or sell to a certified gun dealer, any firearms already in his or her possession.[63] Both of these provisions are enforceable under Penal Code section 12021(g), and possibly also under Penal Code section 273.6(c)(3).

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[57] CAL. PEN. CODE § 136.2(e)(2)(A)-(C) and CAL. FAM. CODE § 6383(h).
[58] CAL. FAM. CODE § 6383(h).
[59] CAL. PEN. CODE § 136.2 (2019) (providing that criminal orders take priority over civil orders).
[60] *See also* CAL. FAM. CODE § 3031 (2019) (recommending that the court make a custody or visitation order consistent with an existing emergency protective order, protective order, or other restraining order).
[61] Blockburger v. United States, 284 U.S. 299 (1932); *see* United States v. Dixon, 509 U.S. 688 (1993). *See also infra* Part A(8)(b).
[62] CAL. FAM. CODE § 6304 (2019).
[63] CAL. FAM. CODE § 6389(c) (2019).

Further, California law allows a judge who has not issued a restraining order against a defendant charged with domestic violence to issue a restraining order, *sua sponte*, that pertains solely to firearms.[64]

b. Federal Law

Federal law also prohibits anyone named as a defendant in a post-hearing domestic violence restraining order from possessing any firearm or ammunition.[65] However, before this provision applies, the order must involve the defendant's child or "intimate partner," which is defined in section 921(a)(32) as a spouse, former spouse, co-parent, cohabitant, or former cohabitant. Note that dating and engagement relationships are not included.

7. Mutual Restraining Orders; Family Code section 6305

Family Code section 6305 provides that mutual restraining orders (in DVPA, dissolution, or paternity cases) may be issued only if both parties personally appear and each party presents written evidence of abuse or domestic violence. Additionally, the court must make detailed findings of fact that both acted primarily as aggressors and neither acted primarily in self-defense.[66] This language conforms to the federal Violence Against Women Act, 18 U.S.C. sections 2265, 2266, governing interstate enforcement of orders.

Mutual orders were disallowed in *Kobey v. Morton*, 228 Cal. App. 3d 1055 (1991), a civil harassment case, where the defendant failed to file an application for an order.

PRACTICE TIP

Note: It is very important to be aware of Family Code section 6305 because of its unique application to domestic violence situations, and because it diverges markedly from the usual family law practice. The practice of seeking and granting mutual restraining orders is commonplace in family court. Motions to grant mutual orders are typically sought by either party during a hearing, without notice to the other side. Since restrictions on parties in a non-abusive situation are most often granted in an equitable fashion, courts have no problem with granting a request or even issuing the order *sua sponte*.

The special protections of Family Code section 6305 recognize that security for the domestic violence victim and his or her children is paramount, and that the batterers, of necessity, must be restricted from accessing or harassing these victims of abuse. Further, in *Monterroso v. Moran*, 135 Cal. App. 4th 732 (Cal. Ct. App. 2006), the court noted that mutual orders were inadvisable in domestic violence cases because they create serious enforcement problems, and they communicate to the parties that the victim is equally to blame.

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[64] CAL. FAM. CODE § 6380(b)(8) (2019).
[65] 18 U.S.C. § 922(g)(8).
[66] Monterroso v. Moran, 135 Cal.App.4th 732 (2006). "The language of section 6305 is clear and its plain meaning must be respected. (In re Marriage of Dupre (2005) 127 Cal.App.4th 1517, 1525-1526, 26 Cal.Rptr.3d 328.) A trial court has no statutory power to issue a mutual order enjoining parties from specific acts of abuse described in section 6320 without the required findings of fact. When a trial court issues such an order in contravention of its statutory obligation to make the required findings of fact, it acts in excess of its jurisdiction. (See Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 291, 109 P.2d 942.)" Id. at 736.

Finally, mutual orders may violate the Fourteenth Amendment's guarantee of due process, as there is seldom notice to the plaintiff that this may occur.[67]

Attorneys should resist mutual orders in domestic violence cases unless there is actual evidence of abuse or serious threats by both parties. In appropriate situations, attorneys should also be prepared to explain to the court why the client's actions were done in self-defense, and why the other party was in fact the dominant aggressor.[68]

8. Enforcement of Orders

a. Criminal Response

Law enforcement officers are required to arrest and take the defendant into custody without a warrant if the officer has probable cause to believe the defendant has violated a restraining order.[69] The officer shall, as soon as possible after the arrest, confirm with the appropriate authorities or the Domestic Violence Protection Order Registry that the protective order has been registered, unless the victim provides the officer with a copy of the protective order.[70] One of the sources of information about such orders is the statewide Domestic Violence Restraining Order System (DVROS), described in Family Code section 6380.[71]

The DVROS is administered by the Department of Justice. Among other purposes, it is used to check whether someone who wishes to buy a firearm is allowed to do so, since anyone currently restrained by a protective order is prohibited from owning or possessing a firearm. All data with respect to criminal court protective orders filed with the court on Judicial Council forms shall be transmitted within one business day by the court to law enforcement personnel, either in hard copy so that the law enforcement agency may enter it into CLETS (California Law Enforcement Telecommunication System) or with authorization by the Department of Justice to enter it directly into CLETS.[72]

Restraining orders issued in California are enforceable in other states, and vice versa.[73] Violation of an out of state restraining order is both a crime and punishable by contempt.[74] Additionally, restraining orders issued by military courts must be entered into the System.[75]

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[67] Deacon v. Landers, 587 N.E.2d 395 (Ohio Ct. App. 1990).
[68] For more information determining the dominant aggressor, see CAL. PENAL CODE § 836 (2019); CAL. PENAL CODE § 13701(b) (2019).
[69] CAL. PENAL. CODE § 836(c)(1) (2019).
[70] *Id.*
[71] *See supra* Chap. 2 for a thorough discussion of law enforcement response to restraining orders.
[72] CAL. PENAL. CODE § 6380 (2019). For more information on the DVROS, call (916) 227-3732.
[73] 18 U.S.C. § 2265(a) (full faith and credit given to protection orders issued in another state, Indian tribe, or territory).
[74] CAL. PENAL. CODE § 273.6(c)(4) (2019).
[75] CAL. FAM. CODE § 6380 (a)(2)(b) (2019) (requires that upon registration with the court clerk of a domestic violence protective or restraining order issued by the tribunal of another state, as defined in section 6401, the court will transmit this information to the Department of Justice who will then enter it into the system); CAL. FAM. CODE § 6401 (7) (2019) (defines state as any other state, territory, tribe or branch of the military that has jurisdiction to issue protection orders).

The person arrested is entitled to be released under the provisions of bail, unless the danger to the victim is so high that bail is denied, as discussed in Chapter 2.

If the law enforcement officer does not, or is unable to arrest the defendant, and the plaintiff desires to pursue criminal proceedings for assault, trespass, or other crimes, he or she should contact the police or sheriff and request a warrant. Although not necessary, it would help if the domestic violence victim had doctor's reports documenting the abuse, photos of injuries, and names of witnesses. A plaintiff protected by a TRO is allowed to record any prohibited communication which is a violation of the order if the court grants permission (i.e., the plaintiff is not guilty of illegal wiretapping).[76]

b. Civil Response: Contempt

In addition to being a criminal offense, a violation of a restraining order is grounds for contempt of court.[77] The plaintiff may file an Order to Show Cause re Contempt, using forms provided by the Clerk of Superior Court. Upon filing the motion, the court will issue an order to the defendant requiring him or her to appear at a hearing on the issue of contempt and to show cause why he or she should not be held in contempt. The procedure is identical to that outlined above for obtaining the TRO. If the defendant does not come to the hearing after being served an Order to Show Cause, the court may issue an order for arrest.

The defendant can be found in contempt of court if he or she has been found to be in violation of the order.[78] The defendant is entitled to an attorney (if he or she is poor, this means a Public Defender) at the hearing. He or she can be sentenced to 5 days in jail, a fine of $1000, or both for each violation.[79]

Family Code section 6386 provides that the court may appoint an attorney to represent the plaintiff in a proceeding to enforce the order, and if the counsel was private (i.e., not the district attorney), the court may order the defendant to pay reasonable attorney's fees and costs incurred by the plaintiff. Especially if the defendant has an attorney, the plaintiff should request that the court appoint an attorney for him or her (if he or she cannot afford one). Some judges may be reluctant, however, to appoint a prosecutor to enforce the order, and it is very difficult to collect money judgments from many defendants in TRO cases, so this is not often an option.

However, it is not recommended that the victim proceed with a contempt action until he or she has heard from the prosecutor that no charges will be filed. Otherwise there may be a double jeopardy problem.[80]

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[76] *See* CAL. PENAL CODE § 633.6 (2019).
[77] CAL. CIV. PROC. CODE § 1209 (2019).
[78] *Id.*
[79] CAL. CIV. PROC. CODE § 1218 (2019).
[80] *See* United States v. Dixon, 509 U.S. 688 (1993).

Case Study #8:

Ms. Law has obtained a restraining order for Ms. Client, which orders Ms. Client's husband, Mr. Abuser, out of the house. Ms. Law helps Ms. Client figure out whether Ms. Client has a friend who would be willing to serve Mr. Abuser. Ms. Law explains that Ms. Client and the friend can ask the local police department to be present during the service, to keep the peace and make sure Mr. Abuser.

Ms. Client calls the police and arranges for them to come Friday at 5:15, when she expects Mr. Abuser to come home from work. Fortunately it's a quiet evening for the police, and they are able to come, as is Ms. Client's friend. The service is accomplished, and Mr. Abuser packs an overnight bag and his carpentry tools and leaves to stay at his brother's place. The police then leave.

However, on Saturday, Mr. Abuser comes back to Ms. Client's, claiming he needs more clothing. He is very angry at Ms. Client, calls her names and issues veiled threats in front of the children. Ms. Client calls the police, but by the time they get there Mr. Abuser is gone. Ms. Client remembers that Ms. Law told her the police are required to take a full report on every domestic violence incident, and tells the officer she needs the report, as she wants to report the violation. Somewhat reluctantly, the officer writes up Ms. Client's statement and takes down the names of the children and their ages.

On Monday morning, Ms. Client calls Ms. Law and asks how to proceed. Ms. Law checks with the prosecutor's office on Wednesday, and is told they do not plan to press charges, as there are no witnesses besides Ms. Client and the children, and there were no injuries. Ms. Law calls Ms. Client, who is very upset, and says something must be done to stop Mr. Abuser, or he will think he can do whatever he wants. So Ms. Law files an Order to Show Cause re Contempt. Ms. Client has Mr. Abuser served at his brother's place.

At the contempt hearing in front of the judge who issued the original order, Ms. Law examines both Ms. Client and Mr. Abuser. The Public Defender is representing Mr. Abuser, as his work is very sporadic. At the end of the hearing, the judge holds Mr. Abuser in contempt, and lectures Mr. Abuser about following the court order exactly. The public defender asks if the sentence, 5 days in the county jail, can be suspended, as he has a job this week, and needs the income. Ms. Law requests that Mr. Abuser be ordered to check in at the jail every Saturday for the next five weeks, and then be released at the end of the day. Due to jail overcrowding, the judge is glad to be able to impose a sentence that will work for the jailers (who will probably release Mr. Abuser after an hour each time), and yet still have enough of an impact on Mr. Abuser that he will think twice before violating the order again.

B. DISSOLUTION/LEGAL SEPARATION/SUPPORT/PROPERTY

1. Financial Issues in Domestic Violence Cases

When assisting a victim of domestic violence in obtaining a divorce, attorneys should recognize that economic stability could prevent the victim and children from returning to the batterer. A batterer may attempt to put the victim at a financial disadvantage by canceling credit cards, taking the family car, and refusing to pay for household expenses. If possible, the domestic violence victim should obtain and provide to his or her attorney copies of important documents such as bank statements, credit card records, tax returns, salary statements, marriage documents, pension statements, and house and car titles before the batterer realizes that the victim is leaving.

In certain cases, attorneys representing victims of domestic violence should seek an agreement that the batterer will pay the victim's attorney's fees and court costs for the duration of the litigation and that the parties will not dissipate marital assets until further agreement. The likelihood that the court will order this is dependent on local practice. However, the Family Code allows courts to use such orders in domestic violence cases where the victim has less money than the batterer does.[81] The Family Code also allows the court to order payment of attorney's fees and costs in cases related to enforcing protective orders.[82]

a. Affording an Attorney

Affording an attorney is a necessary consideration for victims of domestic violence. Family Code sections 2030 to 2032 allow a court to require one party to a divorce to pay the other party's attorney fees based on a disparity of income and assets between the parties. The intention of these code sections is to "level the playing field" and ensure both parties have access to legal representation.

Family Code § 2030 (a) provides in pertinent part:

"(a)(1) In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the

[81] *See, e.g.,* CAL. FAM. CODE § 2030 (allowing the court to order payment of attorney's fees and costs in cases involving divorce, legal separation, nullification of marriage to ensure other party's access to legal representation); CAL. FAM. CODE § 2031 (allowing court order of payment after motion or showing cause; also provides that court must rule on motions made under §2030 within 15 days); CAL. FAM. CODE § 2032 (award possible under sections 2030 and 2031 where "just and reasonable under the relative circumstances of the respective parties." "The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested."); CAL. FAM. CODE § 3121 (allowing the court to order payment of attorney's fees and costs by one party for the other party to ensure adequate legal representation); CAL. FAM. CODE § 6344 (2004) (allowing the court, after notice and a hearing, to order payment of attorney's fees and costs to prevailing party where appropriate based on the parties' respective abilities to pay); CAL. FAM. CODE § 7605 (allowing the court to order payment of attorney's fees and costs by one party for the other party to ensure adequate legal representation in custody and visitation proceedings).

[82] CAL. FAM. CODE § 6386 (2019).

proceeding during the pendency of the proceeding."

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"(2) When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs." (Emphasis added.)

"Under [Family Code] sections 2030 and 2032, a family court may award attorney fees and costs 'between the parties based on their relative circumstances in order to ensure parity of legal representation in the action.' [Citation.] The parties' circumstances include assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties. [Citation.]" *In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 657. See also, *Marriage of Tharp* (2010) 188 Cal.App.4th 1295, which provides, "[i]n assessing one party's relative need and the other party's ability to pay, the family court may consider all evidence concerning the parties' current incomes, assets, and abilities, including investments and income-producing properties." [188 Cal.App.4th at 1313-14].

Although many men and women will have to look to legal aid organizations and pro bono programs, those victims who have an interest in community real property have an additional option. Family Code section 2033 allows a person to encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage or for legal separation. This encumbrance is known as a "family law attorney's real property lien" and attaches only to the encumbering party's interest in the community real property.

Family Code section 2034 provides for the denial of such a lien if the court finds that the encumbrance would likely result in an unequal division of property because it would impair the encumbering party's ability to meet his or her fair share of the community obligations or would otherwise be unjust under the circumstances of the case. It is important that attorneys be aware of this section in case a batterer's request to place such a lien on the community real property would result in unfairness toward the domestic violence victim. If the batterer is attempting to use the lien as yet another way to control the victim by denying her a fair share of the property, the attorney representing the victim should be prepared to make an objection to the batterer's request for such a lien.

b. Fiduciary Duties

Much like in a business partnership, fiduciary duties exist between spouses. Family Code § 1101(a) provides that "[a] spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate." Additionally, the

pleading forms initiating a divorce in California includes a "Summons" (FL-110) which states that automatic standard family law restraining orders are put into effect during the pendency of a dissolution matter. This refers to restraining a person from encumbering, transferring, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the prior written consent of the other party or an order of the court. There is are exceptions, however, for actions that fall under the usual course of a business or those considered the necessities of life.

2. Termination of the Marriage

A divorce decree ends the marriage relationship between two people.[83] A legal separation, on the other hand, does not terminate the marriage.[84] Some people prefer to request a legal separation because of religious or insurance reasons, or because there is no residency requirement for legal separation but they are not the norm and in some cases a separation will be converted into a dissolution.

California, like most other states, has no-fault divorce. Because of no-fault divorce, a person who wants a divorce will be granted it -- even over the objections of his or her spouse. Fault is also not considered in determining property division or custody.[85] Domestic violence is considered in determining spousal support. "Under Family Code section 4325, there is a rebuttable presumption that an award of spousal support should not be made to a spouse who has been convicted of intraspousal domestic violence."[86] In addition, the effects of domestic violence by the supporting party may be considered.[87]

Even if your client does not want to divorce the batterer, she can ask for exclusive custody of any children from the marriage under Family Code sections 3120 and 3121. Family Code sections 3120 and 3121 also allow your client to ask the court to require the batterer to pay her attorney's fees for the custody proceeding.[88]

If you have an immigrant client who is obtaining a divorce, it is extremely important to contact an expert on immigration law and domestic violence, such as the Immigrant Women Project of Legal Momentum, IWP@legalmomentum.org, 202-326-0040[89]. Filing for a divorce can affect the client's immigration situation. See Catherine F. Klein, Leslye E. Orloff, and Hema Sarangapani, "Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children," 39(1) *Family*

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[83] CAL. FAM. CODE § 2300 (2019).
[84] CAL. FAM. CODE § 2347 (2019).
[85] However, courts may enforce California's public policy against domestic violence by refusing to enforce a spousal support order requiring the victim to pay the abuser. In re Marriage of Cauley, 138 Cal.App.4th 1100 (2006).
[86] In re Marriage of Cauley, 138 Cal. App. 4th 1100, 1102 (2019).
[87] CAL. FAM. CODE § 4320(i) (2019).
[88] *See* In re Marriage of Drake, 53 Cal. App. 4th 1139 (1997) ("In assessing one party's relative 'need' and the other party's ability to pay, the court may consider all evidence concerning the parties' current incomes, assets, and abilities, including investment and income-producing properties . . . Furthermore, in determining whether to award attorney fees to one party, the court may also consider the other party's trial tactics." *Id*. at 1167
[89] www.legalmomentum.org

Law Quarterly 109 (2005).

3. Child Support

Under Family Code section 3900 et seq., the court may order child support, payable by the non-custodial parent or one of the joint custodial parents, both on a temporary and permanent basis. The child support order usually follows legislative child support guidelines that set forth the amount of child support to be paid based on the shared income of the custodial and non-custodial spouse, the number of children to be supported, and the amount of time the children spend with each parent.

Court employees called family law facilitators are located in many courthouses. These attorneys are authorized to help unrepresented parties file for or respond to child support requests, including modifying existing child support orders.[90] Some facilitators also help unrepresented parties with other family law matters, e.g., TRO forms.

The address of the custodial parent and child can be kept confidential from the paying parent under the Uniform Interstate Family Support Act, Family Code sections 4926 and 4977-4978, and the Domestic Violence Prevention Act, Family Code sections 6322.5 and 6327.

The Court will determine guideline child support based on each of the parent's incomes. California has a statewide uniform guideline for support.[91] The amount of child support due is established by a formula based on varies factors regarding income and tax implications.[92] A computer program referred to as DissoMaster can be used to determine the guideline support amount. This amount is presumed to be the correct amount that should be ordered but there is a rebuttable presumption where the formula would be unjust or inappropriate for a particular case.[93]

4. Spousal Support

a. Spousal Support Generally

Governed by Family Code section 4300 et seq., in California, spousal support (formerly called "alimony") is not based on fault. Spousal support is generally not awarded on a permanent basis unless the marriage has been a long one, usually extending over 10 years. For marriages of less than 10 years, some courts award spousal support of about one-half the length of the marriage. Spousal support can be ordered on a temporary basis before the judgment, in the judgment itself, or after the judgment (modification or termination). When it is combined with child support, it is called family support.

b. Temporary Spousal Support Guidelines

[90] CAL. FAM. CODE § 10004 (2004).
[91] CAL. FAM. CODE § 4050 (2019).
[92] CAL. FAM. CODE § 4057 (2019).
[93] CAL. FAM. CODE § 4057, subd. (a) - (b) (2019).

The goal of temporary support is to maintain each spouse as closely as possible to their pre-separation status, although this is difficult because two households cost more than one to maintain. Judges often use guidelines in setting these amounts. The guidelines vary from county to county, but should be available from the Superior Court clerk. Spousal support is usually lower when the court also orders child support. The court is allowed to consider any history of domestic violence when reallocating to past temporary spousal support amounts previously distributed from a trust account as child support.[94]

c. Affidavit of Support (Form I-864)

I-864, Affidavit of Support Under Section 213A of the INA, is a immigration form used by family-based immigrants and some employment-based immigrants to show they have adequate means of financial support and are not likely to rely on the U.S. government for financial support.[95] Family members utilizing this form tend to over-report the extent of their income, which creates an issue in family court issues, where the income reported in their I-864 does not match their income report to the family court. Income reported on an I-864 can be enforced in family court.[96]

d. Factors in Ordering Long-Term Support

Orders issued as part of a judgment are complicated since judges may not rely on the temporary support guidelines, must take into account many different factors pursuant to Family Code section 4320, and must determine how long the support will last. The factors taken into account include:

- extent to which each party's earning capacity is sufficient to maintain the standard of living established during the marriage, taking into account what might be required for the supported spouse to develop or acquire marketable skills, and the extent to which his or her earning capacity is or will be impaired by time devoted to domestic duties during the marriage;

- extent to which the supported spouse contributed to the other spouse's attainment of an education, training, a career position, or a license;

- paying party's ability to pay, taking into account earning capacity, earned and unearned income, assets, and standard of living;

- each party's needs, based on the standard of living established during the marriage;

- each party's property (including separate property) and debts;

- duration of marriage;

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[94] In re Marriage of MacManus**,** 182 Cal. App. 4th 330, (Cal. App. 4 Dist. 2010)
[95] U.S. Citizenship and Immigration Services, https://www.uscis.gov/i-864, accessed on March 14, 2019
[96] *In re Marriage of Kumar* (2017) 13 Cal.App.5th 1072 [220 Cal.Rptr.3d 863], review denied (Oct. 18, 2017)

- supported spouse's ability to engage in gainful employment without interfering with the interests of dependent children in her or his custody;

- each party's age and health;

- documented evidence of any history of domestic violence by either or both parties, including, but not limited to, consideration of emotional distress resulting from domestic violence;

- immediate and specific tax consequences to each party;

- balance of hardships to each party;

- goal that the supported party shall be self-supporting within a reasonable period of time, except in the case of a marriage of long duration (*see* Family Code section 4336);

- the criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of spousal support award to that spouse; and

- any other factors the judge deems just;

Where appropriate, attorneys are encouraged to call the court's attention to the existence of domestic violence as a statutory factor in determining spousal support. This may have affected the victim's earning capacity, due to physical or psychological injury. It is important that, if necessary, it be demonstrated that the violence caused psychological harm resulting in the need for funds for counseling costs and ongoing medical treatment. In addition, if the facts exist, evidence should be presented that the victim's job was jeopardized because of the batterer's harassment at the workplace, or that the victim's work record shows a high absenteeism rate because of the abuse, affecting continued employability. In addition, the Family Code allows the court to impose a rebuttable presumption that the abused spouse does not need to pay spousal support otherwise awardable at marriage dissolution if there was domestic violence involved, so it is important to emphasize the existence of domestic violence in such proceedings.[97]

The following additional costs should be included in calculating spousal support:

- relocation expenses,

- emergency housing costs,

- replacement costs for damaged or removed possessions and clothing,

[97] CAL. FAM. CODE § 4325. Note that in situations in which the victim of domestic violence has pled guilty or no contest to abusing the partner or has been found guilty, this can have a negative impact on the victim's eligibility for spousal support. The topic of how victims of domestic violence may become criminal defendants is dealt with in Chapter 2.

- transportation costs related to loss of the automobile,
- transportation costs incurred because of location of new residence,
- payment of medical insurance,
- payment of the victim's medical and dental expenses, and
- costs associated with victim's need to stay in hiding for safety reasons.

e. Modification or Termination of Support

After the judgment, spousal support may be subject to modification or termination under Family Code sections 4334 - 4337. Unless the parties agree otherwise, spousal support terminates when either party dies, when the supported spouse remarries, or when there is another change of circumstances (assuming the court has retained jurisdiction over this issue). Sometimes the court will order support of $1 per month, in order to retain jurisdiction so that support can be increased later. The court may order that the supporting spouse take out life insurance or establish a trust fund to support the other spouse in the event of the supporting spouse's death. It also is possible to increase a spousal support order without an attorney, based merely on changes in the federal government's consumer price index (i.e., rate of inflation). The forms for this are available from the Superior Court clerk.

If the judgment does not mention spousal support, it is waived and cannot be brought up ever again, so it is important to mention if there is a chance that it may be needed in the future.

Family Code section 215 provides that notice for a post-judgment modification request can be served by mail or airmail.

f. Enforcement of Support Orders

Enforcement of spousal support orders under Family Code sections 4338-4360, and 4500 et seq., is similar to enforcing child support orders. This includes a wage assignment, a writ of execution against a bank account, a lien against real estate, interception of tax refunds or lottery winnings, and having the non-paying party held in contempt of court. The Family Support Division of the District Attorney's office may be available to help with enforcement.

5. Division of Property

a. Community Property

In California, community property is divided equally.[98] "Community property" is defined as all property, real or personal, wherever situated, acquired by a married person during the marriage

[98] CAL. FAM. CODE § 2550 (2019).

and before the date of separation of the parties.[99] Marital property also includes all vested pensions, retirement, and other deferred compensation rights, including military pensions eligible under the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. section 1408.

b. Separate Property

Separate property is awarded to the spouse who owns it.[100] "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, descent, or gift during the course of the marriage, or acquired by a spouse after separation of the parties.[101] However, one spouse may not give a gift to the other and have it remain separate property unless it is so stated at the time of conveyance. A gift by one spouse to another during marriage is considered a gift to the marriage and is considered community property in most cases. Some judges will consider personal gifts as separate.

6. Name Change

A name change for a spouse can be part of a divorce decree.[102] The name change can be to a maiden name or formerly used name or to any name the spouse desires.

If a spouse wants to change his or her name to a former name after the judgment has been entered, there is a simple form to fill out and file called Ex Parte Application for Restoration of Former Name After Entry of Judgment and Order. The form is available from the Superior Court clerk's office. Note: It is unclear how this code section would apply to husbands or persons dissolving a domestic partnership.

7. Domestic Partnerships

California law extends all of the rights (except for those pertaining to income tax) afforded to married couples to registered domestic partnerships.[103] "Domestic partners" are defined as two adults "who have chosen to share one another's lives in an intimate and committed relationship of mutual caring," and who qualify to file for a domestic partnership.[104]

Current, former, or surviving domestic partners are afforded the same rights, protections, and benefits, while being subject to the same responsibilities, obligations, and duties under the law as current, former, or surviving spouses.[105] The equality of rights and obligations for domestic partnerships includes those with respect to children.[106] Essentially, all of the above sections should apply to domestic partnerships in the same way as they would marriages, although few legal challenges have tested the limits of these rights and obligations.

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[99] CAL. FAM. CODE §§ 760, 771 (2019).
[100] CAL. FAM. CODE § 2650 (2019).
[101] CAL. FAM. CODE § 770 (20019).
[102] CAL. FAM. CODE § 2080 (2019).
[103] CAL. FAM. CODE § 297 et. seq (2019).
[104] CAL. FAM. CODE § 297 (2019).
[105] CAL. FAM. CODE § 297.5(a)-(c)) (2019).
[106] CAL. FAM. CODE § 297.5(d) (2019).

C. CUSTODY AND VISITATION ISSUES

1. Custody (Family Code sections 3011, 3020, 3040, 3044, and 3064)

a. Custody Determinations and Domestic Violence

- Family Code section 3020 states that legal and physical custody shall be decided according to the best interests of the child. In determining the best interests of the child, Family Code 3020's policy directive states it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children. As part of determining best interest, Family Code section 3011 states that the Court shall consider any history of abuse by one parent against (1) the child, (2) the other parent, or (3) a cohabitant, spouse, or significant other of the parent seeking custody. The Court shall also consider substance abuse by one of the parties. Note that there is no time limit in terms of when this abuse occurred.

- Family Code section 3042 states that the court must consider the wishes of the minor child if the child is of an appropriate age and if it is in the best interest of the child. If the child is 14 or older, the child "shall" be permitted to address the Court regarding custody and visitation, unless the court determines that doing so is not in the child's best interests. The court must also make findings on the record if the court does not consider the minor's wishes.

- Family Code section 3011 also requires the court to state its reasons on the record or in writing if it awards any type of custody to an alleged batterer, child abuser, or substance abuser.

- Family Code section 3046 further provides that any absence or relocation from the home by one parent due to domestic violence shall not be considered in custody determinations if it is of short duration, unless the reason the parent was gone is that a TRO ordered them to leave.

- Family Code section 3020 states that while frequent and continuing contact with both parents is generally presumed to be in the child's best interests, the paramount consideration is the health, safety and welfare of the child; thus, if there is a conflict between these two policies, the latter one controls.

- Family Code section 3020 also states that children have the right to be safe and free from abuse, and that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child.

- Family Code section 3040(c) states, "this section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan which is in the best interest of the child."

- Further, Family Code section 3040's preference for joint custody, when both parents agree, is subject to the "best interest of the child" provisions of Family Code section 3011. In other words, there may be instances where the parents agree to joint custody, but the court decides that this would not be in the best interest of the child.

- Family Code section 3044 creates a rebuttable presumption against any type of custody (sole or joint, physical or legal) to anyone who has perpetrated domestic violence within the past 5 years against the other parent.[107] The statute lists factors that the court shall consider in determining whether the presumption has been overcome. The statute is silent as to cases in which both parents are perpetrators. In these cases, attorneys for victims of domestic violence should advocate that the court determine which party is the dominant aggressor, and then apply the presumption against that party. Issuance of a Domestic Violence Restraining Order constitutes a finding that the restrained party has perpetrated domestic violence, satisfying section 3044. (S.M. v E.P., 184 Cal.App.4th 1249 (Cal. App. 2010). Family Code section 3044 expressly states that in determining the best interests of the child for the purposes of a domestic violence abuser seeking sole/joint custody of the child, "the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part."

- Family Code section 3064 provides that a court shall refrain from making an *ex parte* order granting or modifying a custody order unless there has been a showing of immediate risk that the child will be removed from the State of California or a showing of immediate harm to the child. "Immediate harm to the child" is defined to include having a parent who has committed sexual abuse of the child or domestic violence, where the court determines that the sexual abuse or domestic violence are of recent origin or are a part of a demonstrated and continuing pattern of acts of sexual abuse or domestic violence.

b. Best Interest of the Child where there are Allegations of Child Abuse

Family Code section 3011 specifically states that the court shall consider any history of abuse by one parent against any child related to the requester by blood or affinity, or with whom the requester has had a caretaking relationship, no matter how temporary. The court is also required to consider abuse against the co-parent, the requester's parent, current spouse, or significant other. This section also allows the court to require independent corroboration, such as medical reports, police reports, shelter records, Child Protective Services records, etc. "Abuse against the parent" is defined by cross-reference to Family Code section 6203, the DVPA definition, which defines "abuse" to mean intentionally or recklessly to cause or attempt to cause bodily injury, or sexual assault, or to place a person in reasonable apprehension of imminent serious bodily injury

[107] Parties in custody mediations must be notified of this provision. Parties not in custody mediation, or where custody is not contested, do not have to be notified of this provision. Sabbah v. Sabbah 151 Cal.App.4th 818 (2007).

to that person or to another. Section 6203 also cross-references Family Code section 6320, which contains a much broader definition of abuse.[108]

In cases where the batterer falsely accuses the victim of abusing the child or children, attorneys should be aware of Family Code section 3027.1(a). It states that if a court finds that a party, a party's attorney, or a witness, knowingly made a false accusation of child abuse or neglect during a child custody proceeding, the court may impose reasonable sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and award reasonable attorney fees incurred in recovering the sanctions against the person who made the accusation. Family Code section 3027.1(b) provides that the person requesting the sanctions serve an Order to Show Cause on the person against whom sanctions are sought at least 15 days before the hearing. Furthermore, Family Code section 3022.5 requires the court to grant a parent's motion for reconsideration of an existing child custody order if the motion is based on the fact that the other parent was guilty of falsely accusing the moving parent of child abuse.

Note that the court is prohibited from ordering supervised visitation or denying or limiting custody or visitation for a parent solely because that parent lawfully reported suspected sexual abuse of the child.[109] However, the court is authorized to limit a parent's custody or visitation in some cases if it finds the parent made a false report of child sexual abuse.[110] The family court is also authorized to appoint an investigator to investigate any serious allegations of child sexual abuse.[111]

In addition, attorneys should be aware that Family Code section 3030 states that a person who is required to register as a sex offender under Penal Code section 290 where the victim was a minor, or has been convicted of child abuse under Penal Code sections 273a, 273d, or 647.6, may not be awarded custody of or unsupervised visitation with any child, unless the court finds that there is no significant risk to the child and states its reasons in writing.

If neither parent appears to be suitable to raise the child(ren), it is recommended that the court examine whether this is a short-term or long-term problem. If the battered party's parental ability has been impaired temporarily by the violence, the court may be able to facilitate his or her recovery by ensuring adequate protection from further violence.

In contested custody cases when the juvenile court has been involved, family court judges, family court mediators, and child custody evaluators may be allowed to inspect juvenile case files, which are otherwise generally kept confidential. The evaluator is required to provide a summary of the information used to make any recommendation.

Note that there is a rebuttable presumption that any custody to or unsupervised visitation with a parent convicted of first degree murder of the other parent is not in the best interest of the child.[112]

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[108] *See supra* Part (A)(2)(a).
[109] CAL. FAM. CODE § 3027.5(a) (2004).
[110] CAL. FAM. CODE § 3027.5(b) (2004).
[111] CAL. FAM. CODE § 3027(b) (2004).
[112] CAL. FAM. CODE § 3030 (2004); CAL. WELF. & INST. CODE § 362.1 (1998).

Case Study #9:

Ms. Law is representing Mother, who has been battered for the last eight years by Father, the father of her children. Father's attorney questions Mother's fitness as a parent, pointing out that she has a drug and alcohol problem. Fathers' attorney asserts that since both parents have problems, they are on equal footing, and requests joint custody. Ms. Law objects, and explains that Mother's drug and alcohol problem started after the battering began, and that she is now going to a counselor who specializes in drug and alcohol issues. On the other hand, Ms. Law asserts, Father has not only battered Mother over many years, but Ms. Law has located Father's first wife, Lisa, who is prepared to testify that Father hit her as well.

The court continues the temporary order, giving primary physical custody to Mother, but on the condition that she continue going to her counseling sessions and have periodic drug tests. The court also orders Father to attend batterers' treatment counseling for 52 weeks. Ms. Law suggests that the court review the temporary order in two months, to see how each parent is progressing and how the children are faring. The court agrees, and calendars the case for eight weeks later.

c. Assessing Likelihood of Each Parent Continuing to Abuse Child

Studies have shown that when the victim of domestic violence is directly abusing the children, which appears to be the case in 5% to 33% of all cases,[113] the child abuse usually stops after she has escaped from the domestic violence.[114] On the other hand, rates of child abuse by the perpetrator of partner abuse range upwards of 79% according to one study.[115] Additionally, it is highly likely that the perpetrator will continue to abuse intimate partners in subsequent relationships.[116] Batterers have more than a 50% chance of battering in a new relationship, with rates ranging from 57% to 86% in two non-random studies.[117]

The local family court services office or probation department may provide investigative resources when both parents appear to be unfit. These agencies may help determine the basis of the inability to parent (e.g., battering of one parent by the other), assess the risk to the child of placement with each parent, and recommend appropriate court action (e.g., court protection for one parent from the other, counseling, drug/alcohol rehabilitation, help finding a job or housing, etc.). These services may be especially useful when the problem appears to be short-term.

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[113] Daniel Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 52 (1994) (citing various studies).

[114] NANCY K. D. LEMON, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES 52 (1995).

[115] Deborah Sinclair, *In the Center of the Storm, Durham Speaks Out: A Community Response to Custody and Access Issues Affecting Woman Abuse Survivors and Their Children* (June 2000), Surveying women in Durham, Ontario, Canada, who were in custody disputes with their ex-spouses. www.vpcc.ca/reports.html

[116] *Id.*

[117] Saunders, *supra* note 83, at 53.

However, the ability of court personnel and resource persons to assist effectively in these cases will be limited by their understanding of domestic violence. Attorneys requesting assistance for their battered clients should ensure that all agencies and individuals providing assistance have received a comprehensive training in domestic violence.

d. Minor's Counsel

Family Code section 3150 authorizes the court to appoint counsel to represent the interests of the child in a custody or visitation proceeding if it determines that it would be in the best interest of the child. Parties can request minor's counsel but the court is not required to grant the request. The court can decide to appoint minor's counsel whether or not the parties agree. Depending on the situation one or both of the parties may be asked to bear the cost of having minor's counsel. Courts may appoint a minor's counsel where it believes one or both of the parents are unwilling to effective communicate and interact regarding the child. Courts may not account for the way domestic violence can make communication and interaction difficult and blame the survivor or both parents for the communication breakdown. While some parties may believe that the minor's counsel will take the word of the child, minor's counsel is not required to recommend or credit what the child is saying, but to advocate for the child's best interest.

3. Visitation

Family Code section 3100 states that the court *shall* consider supervised visitation when a TRO has been issued. It is a good idea to ask for supervised visitation whenever the client requests it, and especially when there has been child abuse or threats by the abusive parent to take the child.

Family Code sections 3100 and 6323 state that in domestic violence cases, the court must make very specific visitation orders, including the time, place, and manner of transfer to limit the child's exposure to domestic violence and protect the safety of everyone involved. This is because batterers are rarely good candidates for "reasonable visitation;" it does not work in most cases. Some domestic violence victims have reported that their batterer will show up in the middle of the night, allegedly to see his or her children, and when the victim calls the police, they are not sure if there has been a restraining order violation. After all the order just said "reasonable visitation." Other victims have reported that they have had trouble getting the police to help him or her get the child(ren) back at the end of the visitation period.

In addition to specifying the time, place, and manner of transfer, other restrictions are often appropriate in domestic violence cases. The following ideas are suggested: prohibitions on the abuser's alcohol or drug use for 24 hours prior to and during visitation, phone contact through a third party only, neutral pick-up and drop-off points, using a third party to do the pick-up or supervision, and having the abuser call the third party the night before to confirm that he or she plans to show up the next day or else the victim and children are free to do something else.

Local courts may have contracts with supervised visitation centers, which can supervise just the exchange of the children or the entire visitation period. Some of these centers also provide parent education and/or counseling.[118]

4. Mediation

Mediators are required in Family Code sections 3164 and 1815 to have already received training on domestic violence issues before being hired by Family Court Services. Family Code section 1816 requires that they get periodic ongoing training on domestic violence issues.

PRACTICE TIP

There are a variety of protections in the law for victims who participate in mediation. All these protections look good on paper. However domestic violence victims are sometimes not informed of these rights by the mediator. Additionally, when they *are* informed of these rights and try to exercise them, they are sometimes told that the mediators would prefer not to have separate sessions, or a support person who may be disruptive. The victim's attorney must be prepared to advocate on his or her behalf in order to exercise these rights.

a. Procedural Issues During Mediation

Mediation proceedings through Family Court Services are confidential, are limited to the issues of custody and visitation, and can be modified at any time. The mediator is entitled to interview the child if this is appropriate or necessary. The mediator may also consult with the attorneys.

b. The Right to Separate Mediation

Family Code section 3181 states that victims of domestic violence have the right to separate mediation sessions if they so request. The mediator shall meet with the parties separately and at separate times. Any intake form that Family Court Services uses shall inform the parties of the above right to separate sessions.[119]

c. The Right to a Support Person for the Victim

Victims of domestic violence also have the right to a support person to accompany them in mediation, to provide moral and emotional support.[120] The support person assists the victim in feeling more confident that she or he will not be injured or threatened by the other party during the proceedings. The support person is not present as a legal advisor and shall not give legal advice. Family Code section 6303 clarifies that the support person needs no special training or certification, and can accompany the battered party into all sessions, including orientation and separate sessions. However, a mediator may exclude a support person from mediation if that

[118] *See* CAL. FAM. CODE § 3201 et seq. (1999); *see also* Cal. Standards Judicial Admin. § 26.2 (2002) (governing supervised visitation programs).
[119] CAL. FAM. CODE §§ 3181 (2004).
[120] CAL. FAM. CODE § 6303 (2004).

person participates, acts as an advocate, or disrupts the process of mediation.[121]

d. The Mediator May Exclude Legal Counsel from Mediation

The mediator may also exclude counsel from the mediation proceedings, if the mediator deems this appropriate or necessary.[122]

5. After Mediation

- Some counties provide for mediators to recommend a custody or visitation plan to the court if the parties do not agree on one; others forbid such recommendations. Call your local Family Court Services to find out which practice it follows.

- If the parties do not agree, every county allows the mediator to recommend to the court that an investigation be conducted in greater depth, or that other action be taken to assist the parties to resolve the issues.[123]

- The mediator may also recommend to the court that a TRO be issued to protect the child, or that an attorney be appointed to represent the child.[124]

- If the parties do not agree on a custody or visitation plan after mediation, the mediator refers the case back to court for a hearing.[125]

- If the parties agree on a plan, the agreement shall be reported to their attorneys before it is reported to the court. It does not become a court order until both parties have affirmed it at a hearing or by written stipulation.[126]

6. Evaluation/Investigation

- Where mediation is unsuccessful and is referred back to the court, the court may order that an evaluation (investigation) take place.[127] The goal of this process is to give the court more information on which to base a custody and visitation decision.

- Under Family Code section 3110.5 this process may be conducted by Family Court Services, the court may appoint a private evaluator, or the parties may agree on a private evaluator. If the evaluator is private, the parties must pay for the services; if the evaluator is court-appointed, the court may order one or both parties to repay the county the amount the court deems proper.[128]

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[121] CAL. FAM. CODE § 3182 (2004).
[122] *Id.*
[123] CAL. FAM. CODE § 3183 (2004).
[124] CAL. FAM. CODE § 3183-3184 (2004).
[125] CAL. FAM. CODE § 3185 (2004).
[126] CAL. FAM. CODE § 3186 (2004).
[127] CAL. Fam. Code § 3111.
[128] CAL. FAM. CODE § 3112 (2004).

- Family Code section 3111 provides that, where directed by the court, the court-appointed investigator shall conduct a custody investigation and file a written confidential report on it. The parties and their attorneys also receive a copy at least 10 days before the hearing. All custody evaluators are also required to receive training on domestic violence, as approved by the Judicial Council.[129]

Note: It is recommended that before the evaluator conducts the evaluation, the attorney for the victim request a copy of the evaluator's domestic violence certification forms, to ensure that the evaluator has in fact received both the initial and the annual update training.

- Family Code section 3113 states that where there has been a history of domestic violence between the parties, or where a TRO is in effect, at the written request of the victim the parties shall meet with the evaluator separately and at separate times.

- The evaluator may recommend the appointment of counsel for the child, stating the reasons for this recommendation to the court.[130]

- The evaluator must be available to be cross-examined at trial concerning his or her investigation and recommendation.[131]

Case Study #10:

It is now two months later and Mother and Father's case is back on the calendar for review. Ms. Law reports to the court that the parties have been unable to come to an agreement about long-term custody arrangements. Father is still requesting joint physical custody, and Mother wants to continue to be the primary caretaker. The parents have gone to 2 mediation sessions, meeting separately the first time, and together the second (which Mother requested).

Ms. Law and Father's attorney have agreed that the case needs to go to evaluation, but have not agreed on an evaluator. The court orders an evaluation, and suggests as an evaluator one of the usual professionals in the county. Ms. Law objects, stating that as far as she knows, this evaluator has not received any Judicial Council-sponsored training on domestic violence, and that Family Code section 3111 requires this of all custody evaluators. The court states that it will direct the Court Administrator or Family Court Services to obtain curriculum vitae from all the evaluators who usually conduct evaluations, after which the court will review them to ascertain which evaluators are eligible for such a position.

7. Parenting/Counseling Classes

The court may require parents involved in a custody or visitation dispute, and the child, to participate in counseling for up to 1 year, if the court finds that the dispute poses a substantial danger to the best interest of the child, and that the counseling is in the best interest of the child.

[129] CAL. FAM. CODE § 3110.5 (2004).
[130] CAL. FAM. CODE § 3114 (2004).
[131] *See* CAL. FAM. CODE §§ 3115, 3117 (2004).

The court shall state its reasons for finding both of these, and for finding that the financial burden of counseling does not otherwise jeopardize a party's other financial obligations. Each party bears her or his own costs, unless there is good cause to apportion this differently.[132]

- Where there has been a history of child abuse or domestic violence between the parties, and/or a TRO is in effect, the court may order the parties to participate in counseling separately and at separate times.[133]

- According to Family Code section 3191 the goals of this counseling are to facilitate communication between the parties regarding their minor child's best interest, to reduce conflict regarding custody or visitation, and to improve the quality of parenting skills of each parent.

8. Use of Experts

Courts are increasingly relying on mental health professionals to assist in the resolution of custody cases. These professionals may play the role of evaluator, mediator, arbitrator, or special master. Depending on their roles, they may make the custody or visitation decision themselves, or may make a recommendation to the court, which then makes the decision.

Commentators have expressed grave concerns about the advisability of using mental health professionals to help resolve domestic violence custody cases, pointing to their almost universal lack of training in the subject of domestic violence and consequent inability to recognize the issues or to respond appropriately.[134] One study surveyed several hundred therapists regarding two actual domestic violence cases, including one where the victim was eventually killed by the perpetrator. The study found that:

- 41% of the therapists failed to identify any of the obvious evidence of the violence.

- Not one therapist identified lethality as a concern.

- Those therapists who did identify the conflict seriously minimized its severity.

- 55% said they would not intervene.

- Another 14% concluded that they would work on the couple's communication style.[135]

Clearly these therapists did not know what to do with battered women and batterers. While this study was conducted many years ago, attorneys representing victims of domestic violence are

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[132] CAL. FAM. CODE § 3190 (2004).
[133] CAL. FAM. CODE § 3192 (2004).
[134] Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 Am. U.J. Gender Soc. Pol'y & L. 657, 708-10 (2003); Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002).
[135] M. Harway & M. Hansen, *Therapists' Recognition of Wife Battering: Some Empirical Evidence*, 6 FAM. VIOLENCE BULLETIN 16 (1990).

advised to carefully screen any mental health professionals working with their clients on a legal matter, inquiring as to the therapist's experience and training in this area, and perhaps requesting a resume or curriculum vitae.

9. Interstate Custody/Relocation Issues

A major area of civil law involving domestic violence is that of interstate custody issues. Taking children and crossing state lines with them may raise both civil and criminal issues. These should be carefully discussed with clients.

Residents of the U.S. are very mobile, and have little concern about traveling to another state. Domestic violence victims often cross state lines to escape from batterers. As part of the power and control that the batterer attempts to exercise over his or her partner, the batterer may insist that the victim accompany the batterer to a new state in order to isolate him or her from his or her support system and family. In such instances, when the victim leaves the batterer, he or she is likely to return to his or her home state and bring the children along.

Conversely, batterers are also likely to take their children away from the victim parent, and to cross state lines with the children. This may occur when the domestic violence victim has left, and the batterer is holding the children hostage until he or she returns.

a. Penal Code Sections

Victims of domestic violence generally take the children when they flee from the batterer. In so doing, they may violate laws against kidnapping or custodial interference.[136]

However, Penal Code section 278.7(b) specifically provides a domestic violence defense where a person with a right to custody of a child has been a victim of domestic violence. The victim must be able to show a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm and that, consequently, he or she has taken, enticed away, kept, withheld or concealed that child. "Emotional harm" includes having a parent who has committed domestic violence against the parent who is taking, enticing away, keeping, withholding, or concealing the child.

Subdivision (e) of Penal Code section 278.7 also provides that the taking parent's new address and phone number cannot be disclosed unless released "pursuant to state law or by a court order that contains appropriate safeguards to ensure the safety of the person and the child."

Penal Code section 278.7 provides, further, that the domestic violence victim who is taking the child be required to make a report to the district attorney of the county where the child resided before the parent and child left. The code section states that the taking parent has at least 10 days to make this report. The report must include the name of the person, the current address and telephone number of the child and the person, and the reasons the child was taken. The code section states that the taking parent must also commence a custody proceeding, and provides that the parent has at least 30 days to file this action. These time frames are minimums, not

[136] CAL. PENAL CODE § 277 et seq. (1999).

maximums.[137]

b. Interstate Issues:
The Uniform Child Custody Jurisdiction Act (UCCJA),
The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and
The Parental Kidnapping Prevention Act (PKPA)

On the civil side, if the taking parent has crossed state lines and petitions the court in the new state for custody, the statutes which come into play are the state Uniform Child Custody Jurisdiction Act (UCCJA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Family Code sections 3400 et seq.), and the Federal Parental Kidnapping Prevention Act (PKPA). The UCCJA has been replaced by the newer UCCJEA in most states. Generally, the UCCJA and UCCJEA apply if there is no prior custody order, and the PKPA applies if the court is being asked to modify another state's custody order.

(1) Emergency Jurisdiction

The UCCJEA is found at Family Code section 3400 et seq., and its federal counterpart, the PKPA, is found at 18 U.S.C. sections 1073, 28 U.S.C. section 1738A, and 42 U.S.C. sections 654, 663. In order to discourage forum-shopping, both Acts provide that the general rule is that the custody decision and any modifications should be made in the home state, defined as the state in which the child has resided for the previous six months and in the case of a child less than six months old, the State in which the child lived from birth. Periods of temporary absence are counted as part of the six-month or other period. However, there is an "emergency jurisdiction" exception, which may be relevant in domestic violence cases.[138]

(2) Unclean Hands

Ca. Family Code section 3428 provides that the court is required to deny jurisdiction to any parent who has "unclean hands," including situations in which the parent took the children unilaterally. However, subsection (d) of this code section states that evidence of domestic violence as the reason for the taking should negate any finding of unclean hands.

(3) Privacy Protections

The UCCJEA requires that the petitioning parent disclose the addresses where the child has been living for the last 5 years, the names of the other residents, and their relationships to the child. This provision is potentially very dangerous to domestic violence victims, and to their friends and relatives, since the victim may thereby be forced to disclose her entire support system to the batterer. Batterers have been known to retaliate against everyone who helped the victim to leave.

[137] CAL. PENAL CODE § 278.7(c)-(d) (1999).
[138] CAL. FAM. CODE § 3424 (2004).

California has amended its version of the UCCJEA to allow the battered party to disclose this information alone to the judge in chambers, or to withhold it as confidential.[139]

Case Study #11:

Ms. Law gets a call from the local shelter regarding a new resident who just arrived from X state, where her husband, Mr. Control, still lives. This resident, Ms. Fearful, brought her two children with her - one is Mr. Control's child and the other is not. (Mr. Control did not adopt the second child). Ms. Fearful has no custody order, and is worried about what to do. She did not tell Mr. Control where she was going, and does not want him to know her address in California.

After checking X state's statutes and case law, Ms. Law explores with Ms. Fearful the consequences of filing for emergency, temporary custody in California, explaining that this would help keep Mr. Control from possibly getting the FBI or other law enforcement personnel to start looking for her. Ms. Law also explains that Ms. Fearful has not committed any crime, since domestic violence is a defense to federal parental kidnapping, and since X state does not criminalize parental kidnapping if domestic violence has occurred. In fact, the X statutes are identical to those in California, so Ms. Law tells Ms. Fearful about the need to notify the DA in her home county, and to file for custody in order to prevent possible criminal charges in X state.

Once Ms. Law explains to Ms. Fearful that her exact whereabouts will not be disclosed by filing for custody, and that California allows judges to grant temporary orders in such cases, Ms. Fearful agrees that filing would be a good idea. Ms. Law also tells Ms. Fearful that the California court is not allowed to hold against Ms. Fearful the fact that she took the children without Mr. Control's consent and did not tell him where she was going. Ms. Fearful says she is very relieved to hear this and makes an appointment to come to Ms. Law's office the next day.

c. Relocation

Another civil issue raised in the area of domestic violence and interstate or international removal of children is relocation requests by domestic violence victims. In this situation, the victim parent petitions the court for permission to move with the children intrastate, interstate or internationally. Such requests may arise when there is no custody order, when the existing custody order is not working, or when the victim desires to pursue his or her education, obtains a new job, reunite with his or her original support system, or feels the need to put greater space between himself or herself and the batterer in order to protect himself or herself and the children. Additionally the victim may be able to establish financial independence from the batterer only by relocating to attend school or accept a particular job. Furthermore, the victim may have remarried and his or her new spouse or partner now needs to move for educational or job-related

[139] CAL. FAM. CODE § 3429 (2004).

reasons.[140]

(1) Notice to Parent regarding Change of Residence

Family Code section 3024 requires that when a custody order is made, *if the court does not consider it inappropriate*, the court may specify that the custodial parent shall notify the other parent of any plans to change the residence of the child for more than 30 days, unless there is prior written agreement to the removal. The notice shall be given before the contemplated move, by mail, return receipt requested, to the last known address of the parent to be notified, and sent to that parent's attorney. The section also provides that notice should be sent at least 45 days before the planned move to allow time for mediation of a new agreement concerning custody.

In order to avoid this requirement to ensure the victim's safety and that of his or her children, the attorney for the domestic violence victim should ask the court not to make such an order, or to reverse such an order if the client wants this due to safety reasons. Any documentation of the batterer's threats or abuse, especially occurring after the custody order was issued, would be useful (e.g., police reports, TROs, statements from witnesses, etc.).

(2) Evidence of Non-Vindictiveness

Until recently, the burden in California was often on the custodial parent to prove that a move was not vindictive behavior directed toward the non-custodial parent and was in the best interest of the child as well as the custodial parent.[141] However, *In re Marriage of Burgess*, 13 Cal. 4th 25 (1996), states that the custodial parent has the presumptive *right to change the residence of the child*, subject to the power of the court to restrain removal where its purpose was to frustrate visitation or otherwise prejudice the rights of the child.[142]

(3) Case-by-case Determinations

Requests for relocation in domestic violence cases have had very mixed results, with some courts granting them readily if domestic violence has occurred, and others generally denying them.[143] Of course, the facts of each case vary greatly.

d. International Issues: Hague Convention & International Child Abduction Remedies Act

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[140] Keith R. v. Superior Court, 174 Cal. App. 4th 1047 (2009)

[141] *See, e.g.*, In re Marriage of Carlson, 229 Cal. App. 3d 1330 (1991); In re Marriage of McGinnis, 7 Cal. App. 4th 473 (1992) (denying relocation because it would interfere with the non-custodial or joint custodial father's right of visitation).

[142] *See also* In re Marriage of Whealon, 53 Cal. App. 4th 132 (1997) (ruling that relocating party does not need to show necessity to move).

[143] *See id; see also* In re Marriage of Hoover & Shaw, 40 Cal. App. 4th 433 (1995) (denying relocation); In re Marriage of Carlson, 229 Cal. App. 3d 1330 (1991) (denying relocation).

International child abduction also occurs in domestic violence cases. The statute that deals with this area is known as the Hague Convention. It is an international treaty that deals with international child abduction, found at 22 C.F.R. Part 94, Fed. Reg. (June 28, 1988).

PRACTICE TIP

If your client advises you that he or she thinks the batterer may abduct the child to another country, it is advisable to request supervised visitation and ask the court to order the other parent to turn the child's passport over to the court for safe-keeping. If there is not yet a passport for the child, it is recommended that you obtain a court order and then notify the State Department that no passport or visa should be issued for the child.

If the other parent has already taken the child, and the child is under age 16, you first need to determine if the other country is a signatory to the Hague Convention by contacting the State Department, and then ascertain if it has been less than one year since the taking. If so, there is a presumption that the child should be returned to the home country. There are also now many US cases finding that domestic violence can be the basis for a court's refusal to return a child to a batterer under the Convention.[144] If, on the other hand, your victim client has just taken the child to another country, you might want to quote the articles in the convention that forbid the return of the child to an unsafe situation.[145]

PRACTICE TIP

For further resources on the UCCJEA, PKPA, Hague Convention and ICARA, contact The Legal Resource Center on Violence Against Women in Takoma Park, Md. (301-270-1550 or www.lrcvaw.org.

Or contact the Family Violence Department of the National Council of Juvenile and Family Court Judges, Reno, Nev., 800-527-3223 or www.ncjfcj.org.

For further resources on the Hague Convention and ICARA, contact the Central Authority, U.S. State Dept., (202) 647-2688 or (202) 647-3666. Please also see the State Department's Website for further information at http://travel.state.gov/family/family_1732.html.

D. MODIFICATION OF FAMILY LAW ORDERS

Family Code section 215 provides that after entry of a judgment of dissolution of marriage, nullity of marriage, legal separation, or paternity, or after a permanent order in any proceeding in

[144] *See* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000); *see* Miltiadous v. Tetervak, 2010 WL 597243 (E. D. Pa., 2010).
[145] *See* Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, T.I.A.S. 11670, 1343 U.N.T.S. 89, arts. 13b-20 (Oct. 25, 1980) (entered into force Dec. 1, 1983); *see also* International Child Abduction Remedies Act (ICARA), 42 USC section 11601 et seq. (applies in this area and includes a defense if the child was taken because of domestic violence toward the taking parent).

which there was at issue the visitation, custody, or support of a child, no modification of the judgment is valid unless notice is served upon the party. Service upon the attorney of record is not sufficient. A postjudgment motion to modify a custody, visitation, or child support order may be served on the other party or parties by first-class mail or airmail.

Family Violence Appellate Project

Pro Bono Attorney Manual
Chapter 3:

Handling an Appeal

Contents

Introduction

Representing survivors of domestic violence in court–even at the appellate level–is often more nuanced than representing other individuals. This is because, unlike other cases, survivors' (and their children's) safety must remain at the forefront of representation due to the dynamics of domestic violence. Merely because a survivor has left the party who was abusive, does not mean that the abuse ends. Indeed, research has shown that survivors are at increased risk of harm when they separate from the person who has abused them and/or when they engage in legal activity against that person.

Additionally, unlike many other cases, survivors often have multiple court cases simultaneously occurring against the individual who is abusive. A survivor, for example, could be appealing the denial of her domestic violence restraining order case while still having to confront the other party in on-going custody litigation. Furthermore, a survivor's circumstances may have changed significantly since the Notice of Appeal was originally filed. When representing a survivor on appeal, discussions with the survivor about their circumstances should happen during the appeal process.

A recent case FVAP worked on illustrates how a survivor's circumstance might change during the appeal process. *Survivor appealed the denial of their restraining order request. Prior to filing the opening brief, the survivor told FVAP and co-counsel that the opposing party had not had any contact with them or their child since the trial court entered the order denying their restraining order request. This was a big change from what was happening before the appeal was filed because, prior to filing the appeal, the opposing party was contacting and harassing the survivor frequently.*

Here it would have been easy for FVAP and co-counsel to file the opening brief because they had spent time on it. Filing the brief without conversation with the survivor, however, would not have been a nuanced, survivor-centered approach that focused on their safety. Thus, rather than filing the brief, FVAP spoke with the survivor about their current circumstances and the potential advantages and disadvantages of going forward with the appeal. One potential disadvantage of continuing with the appeal was that it could "poke the sleeping bear" – i.e. it could be the catalyst for the opposing party to start contacting the survivor and demanding visits with the child again. One potential advantage of continuing the appeal was that, if successful, the survivor would have a protection order against the other party. Ultimately, it was the survivor's decision whether to continue with the appeal or not. Remaining in regular contact with the survivor and having this conversation with them, however, was paramount to approaching the appeal through a survivor-focused nuanced lens.

This chapter is designed to provide both procedural and practical information and tips about unlimited civil appeals in California. Sections will include links to relevant law and court forms and will provide practice tips where appropriate. Throughout information will be woven in about how family law cases and working with survivors may be different and more nuanced than working with other individuals on non-family law appellate cases and how FVAP and co-counsel work together as a team.

Background Information: Appellate Court Districts

All family law cases are handled by one of the six appellate districts in California. Which district will handle your appellate case is determined by the county in which the trial court is located. The map of the six appellate districts is below and can found at http://www.courts.ca.gov/8753.htm

Some Districts, such as the First District, have local rules that are unqiue to their district. Be sure to see whether any local rules apply in the District your case is in.

First District:
http://www.courts.ca.gov/1dca.htm
Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma Counties

Second District:
http://www.courts.ca.gov/2dca.htm
Los Angeles, San Luis Obispo, Santa Barbara, and Ventura Counties

Third District:
http://www.courts.ca.gov/3dca.htm
Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, and Yuba Counties

Fourth District:
http://www.courts.ca.gov/4dca.htm
Imperial, Inyo, Orange, Riverside, San Bernardino, and San Diego Counties

**The Fourth District has three separate divisions. Each division is in a different physical location and the divisions operate independently of each other.*

Fifth District:
http://www.courts.ca.gov/5dca.htm Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne Counties

Sixth District:
http://www.courts.ca.gov/6dca.htm
Monterey, San Benito, Santa Clara, and Santa Cruz Counties

Steps of An Appeal

There are a number of steps involved in appealing a case. In some cases, some of these steps may have already been completed by the time you become involved in the case. It, however, is important to understand each step and check all documents that have been filed prior to your entry of appearance because, if paperwork is not correctly submitted or not timely submitted, the appeal could be dismissed.

1) Notice of Appeal

To initiate an appeal, a Notice of Appeal (NOA) must be filed. Generally, the NOA must be filed within (A) 60 days after the superior court clerk serves a Notice of Entry of judgment or a file-stamped copy of the judgment, showing the date either was served; (B) 60 days after either party serves a Notice of Entry of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or (C) 180 days after entry of judgment. CRC 8.104.

Procedural Steps

a. Use Judicial Council from AAP-002 for the Notice of Appeal (NOA).
b. The NOA is filed in the Superior (Trial) Court.
c. The opposing party must be served by mail or personal service prior to filing the Notice of Appeal.
d. The proof of service must be filed along with the Notice of Appeal.
e. You may use APP-009 or APP-009E for the proof of service.
f. You should attach the proof of service to form APP-002.
g. Here is a Sample NOA for a Domestic Violence Restraining Order case.

Practice Tips

- Not all Superior Courts accept electronic filings.
- In most cases the survivor will have filed the NOA before you file your entry of appearance.
- If the NOA has been filed before you start the case, review the NOA to make sure it states the correct court order that is being appealed. A case can be dismissed if the NOA references the wrong court order.
- If the NOA has been filed before you start the case, you will have to file a Substitution of Counsel and/or an Association of Counsel. Here is a sample Substitution of Counsel and a sample Association of Counsel.

Filing Fees and Fee Waivers

A $775 filing fee or fee waiver application is required with a Notice of Appeal (NOA), though the fee waiver can be filed after the NOA is filed. An additional $100 deposit must be made, payable to the Clerk of the Superior Court. Gov. Code §§ 68926, 68926.1.

If the survivor is the Respondent a $390 filing fee or fee waiver application is required with their first-filed document. For most or all of Family Violence Appellate Project's clients, **a fee waiver should be requested.** Most survivors will have filed for a fee waiver prior to your involvement in the case.

"Domestic violence leads to economic hardship, and economic hardship leads to increased risk of domestic violence." [i]

Procedural Steps

a. Complete *Request to Waive Court Fees* form FW-001

b. Make sure that the box "Supreme Court, Court of Appeal, or Appellate Division of the Superior Court" is checked off in question 4.

c. Know that a client can request that other fees, such as the cost of preparing the Clerk's Transcript, be waived as well.

d. The Request to Waive Court Fees should not be served on the opposing party. They are considered confidential documents.

e. The fee waiver should be filed in the **Superior Court** with the Notice of Appeal.

f. The application for fee waiver is deemed granted unless that court gives notice that further actions need to be taken within 5 court days after the application is filed.

g. See Rule 8.26 and informational sheets APP-015/FW-015-INFO for more information.

Practice Tips

- Even if a survivor has a fee waiver already filed with the Superior Court, they must file a new form for the appellate case.
- If the survivor does not pay the filing fee or file a waiver, they will be sent a notice from the Court of Appeals stating that the appeal may be dismissed if they do not pay the filing fee or file the application for waiver within 15 days from the date of the notice.
- Survivors often receive this "default" notice because 1) they do not realize they have to file for a fee waiver for the appeal because they already have a fee waiver in the Superior Court or 2) they check the wrong box in question 4 on form FW-001 (they check that they are seeking waiver of Superior Court fees instead of checking that they are seeking waiver of Supreme Court, Court of Appeals, or Appellate Division of the Superior Court fees.)
- Even if a survivor has a fee waiver, the $100 Clerk's deposit may not be waivable in the county where the appeal is being filed. Gov. Code § 68926.1

Why are Fee Waivers so Important?

Fee waivers are so important because many survivors cannot afford court fees (or legal representation) due to the abuse. 99% of survivors experience some form of economic abuse.[ii] Economic abuse can include behaviors such as the other party refusing to allow the survivor to work or interfering with their work, putting debt in the survivor's name, or refusing to allow the survivor to attend school.[iii] Additionally, there are tangible costs (direct and indirect) to obtaining safety: "For survivors of domestic violence, safety often hinges on access to economic resources. The real costs of safety include: relocation, new housing, having to change jobs or find a flexible employer, transportation, child care, seeking legal protection from an abusive partner, and legal representation."[iv] Because safety comes at a cost, women living in poverty experience higher rates of domestic violence.[v]

Does Filing an Appeal Stay the Trial Court Proceedings?

Filing an appeal **does not** stay all trial court proceedings and enforcement of the judgement or order. Rather, Code of Civil Procedure sections 916 et seq. governs which proceedings at the trial court and enforcement of the judgments or orders are stayed when an appeal is filed.

Filing an appeal does not stay orders that "award, change, or otherwise affect" custody and visitation of minor children, or orders for the temporary removal of a party from a dwelling. Code Civ. Proc. § 917.7. However, the trial court may, in its discretion, stay execution of these provisions pending appeal. *Id.; see also id*. § 918, § 923. And orders allowing a parent to move to another state with the parties' children are stayed for 30 days. 917.7.

To request that the Court of Appeal stay a custody decision, a petition for writ of supersedeas must be filed pursuant to CRC 8.112 and 8.116. The court must hold a hearing before it may issue a writ staying an order that awards or changes the custody of a minor. CRC 8.112(d)(2).

Orders to return children to another state or country in actions brought under the UCCJEA and the Hague Convention are not considered orders that "award, change, or otherwise affect" custody, and thus are automatically stayed when an appeal is perfected. *Id.*

In cases, such as custody, where the filing of an appeal does not stay the trial court order it will be important to discuss with your client whether to try to stay the order.

2) Civil Case Information Sheet

The Court of Appeal will send a Civil Case Information Sheet (CCIS), Form APP-004 to you (or the survivor if you are not the attorney of record yet) after the Notice of Appeal is filed.

Procedure

The Civil Case Information Sheet must be filed in the Court of Appeal and served on the opposing party within 15 days of the date of the Court of Appeal's letter.

Practice Tips

- It is not uncommon for the survivor to have filed the CCIS prior to you starting the case.
- The court order that is being appealed must be attached to the CCIS.
- If the CCIS is not filed within the 10 days, the Court of Appeals will send a notice stating that the CCIS has not been filed and the appeal may be dismissed if it is not filed within 15 days from the date of the notice.
- Sample CCIS for an appeal of a denial of a restraining order is here.

3) Designating the Record

Designating the record is how litigants provide the record of the trial court proceedings to the Court of Appeal. There are typically two parts of a record that will need to be sent from the Superior Court to the Court of Appeals: (1) documents and (2) oral proceedings (transcripts). The rules for designating the record on appeal are in Title 8, Article 2, Rules 8.130-8.163.

Within 10 days of filing the Notice of Appeal, the Appellant must file a Notice Designating Record on Appeal, Form APP-003 with the Superior Court telling it what documents and oral proceedings to include in the record to be sent to the Court of Appeal.

Practice Tip

Be sure to designate **all** parts of the record that the Court of Appeal will need to decide the case.

Sample Notice Designating the Record for a DVRO appeal can be found here.

Designating the Record: Documents

There are five ways to designate documents as part of the record:

1) A Clerk's Transcript
2) An Appendix
3) The Original Superior Court File
4) An Agreed Statement
5) A Settled Statement

The most common ways to designate documents as part of the record are by using a Clerk's Transcript or An Appendix.

Clerk's Transcript

An Appellant can request that a Clerk's Transcript (CT) be prepared. The CT is prepared by the clerk of the Superior Court and contains a compilation of documents that have been filed in the Superior Court.

Each document to be included in the **CT must be identified by its title and filing date** on form APP-003.

A CT is an option if all documents you want to include in the record were filed with the Superior Court. A CT has the advantage of being free if the client has received a fee waiver.

What if I represent the Respondent?

Within 10 days after service of the Notice Designating Record on Appeal, the Respondent may file and serve a notice designating additional documents to be included in the CT using form APP-010.

Practice Tips

- Only use a CT if **all** the documents that you want to include in the record were filed with the Superior Court.
- Do not use a CT if you want to include any documents that were not filed with the court, such as letters between the parties, discovery documents, or social science articles.
- You will need to list the documents you want included in the CT.
- CT is free if the client received a fee waiver or requests a fee waiver. *See pgs 3-4 above.*
- If the Appellant is seeking a fee waiver attach the order granting the earlier fee waiver or a new fee waiver application, *Request to Waive Court Fees* form FW-001, to the APP-003.
- If the Appellant does not ask for a fee waiver, the clerk will send the Appellant a bill for the preparation of an original and one copy of the CT, which must be paid within 10 days.
- Once payment is made, the clerk will forward the original CT directly to the Court of Appeal and will send the Appellant a copy. The Respondent may purchase a copy from the clerk.
- If payment is not made within 10 days, the Court of Appeals will send a notice stating that the payment has not been made and the appeal may be dismissed if payment is not made within 15 days from the date of the notice.

What often happens with Clerk Transcripts

- A client may have designated the record (filed APP-003) before you became involved in the case. Usually, when clients file the APP-003 on their own, they request a CT.
- If the Appellant requests documents to be included in the CT and the court does not have these documents on file, there will be a notice in the CT that indicates that these documents were not included in the CT and why they were not included.
- If a CT was requested, it is important to carefully review the CT to 1) make sure that every page of each document is included and 2) determine if any documents that were not included in the CT should be made part of the record.
- If you notice that pages of included documents were unintentionally omitted by the clerk's office, you will need to file a motion to correct this.
- If the CT does not include all of the documents needed to decide the case, you will need to file a Motion for Leave to Amend the Record Designation and to Augment Record on Appeal. Here is a sample motion.

An Appellant can prepare an appendix themselves. An appendix is a collection of documents, whether filed with the Superior Court or not, that you want the Court of Appeal to review. Because there may be documents that the parties want to include in the record that were not filed with the Superior Court, an appendix is a common way to designate documents for the record.

Advantage of an Appendix

It provides more flexibility in the documents that are included in the written record presented to the Court of Appeal. Because the appendix is not filed until the opening brief there is more time to obtain and decide what documents to include in the record.

Disadvantage of an Appendix

An appendix is not covered by a fee waiver. This means the Appellant must pay for copies themselves. As discussed on pages 3-4, survivors often have limited funds due to the abuse. Thus, when law firms agree to cover the costs on appeal, it can greatly assist survivors by allowing the survivor to prepare an appendix.

Joint Appendix

Parties could agree on a Joint Appendix that will contain all the documents. However, often it is not practical, possible, or safe to agree on a Joint Appendix–particularly in cases involving gender-based violence. Thus, parties often prepare (and pay for) their own separate appendices.

Practice Tips

- The Appellant must indicate on form APP-003 that they are preparing their own appendix.
- The appendix must be filed and served at the same time as the opening brief.
- The appendix must be prepared in accordance with CRC 8.124.
- The Appellant may designate additional documents, if necessary, in an Appellant's Reply Appendix filed and served at the same time as the reply brief. CRC 8.124.
- **Preparing an Appendix is time-consuming so start early.**
- Although a client may be able to scan and email documents to you, do not assume that the client will be able to obtain the file for you.
- If the client cannot obtain the file, you will likely need to use a document/court runner to obtain the file.
- If files are confidential ask the trial court what is needed for a runner to get them.
- Examining the online docket or register of action will help you determine what documents you may want.

If the Survivor is the Respondent

If the Appellant filed an appendix, the Respondent may designate additional documents for the record by filing and serving a Respondent's Appendix at the same time as the Respondent's brief.

If the Respondent wants to prepare their own appendix but is not sure that the Appellant will choose to file an appendix, they must file a Respondent's Notice Electing to Use an Appendix, form APP-011, within 10 days of the Notice of Appeal being filed. APP-011 should be filed in the Superior Court.

If the Respondent does not timely file the APP-011 and the Appellant chooses to use a Clerk's Transcript instead of an appendix, the Respondent will also have to use the CT to present their written record to the court, but can cross-designate records to include in the CT using form APP-010. CRC 8.122.

If a local rule of the appellate court permits, the parties may stipulate to use the original superior court file instead of a clerk's transcript. CRC 8.128. Generally, using the original Superior Court file is not preferrable to either the Clerk's Transcript or the Appendix because it includes documents that are not necessary for the appeal.

Procedure

a. The parties' stipulation must be filed in the Superior Court with the Notice Designating the Record on Appeal.

b. Parties must also serve the Court of Appeal with a copy of the stipulation.

c. Within 10 days of the stipulation being filed, the Superior Court clerk will mail the Appellant an estimate of the cost to prepare the file.

d. The Appellant must deposit the cost or file an application for, or an order granting, a waiver of the cost within 10 days after the clerk mails the estimate.

e. Within 10 days thereafter, the Superior Court clerk will put the original file in chronological order.

f. The Superior Court will send the original file to the appellate court.

g. The Superior Court will send copies of the file to the parties.

An Agreed Statement

The record also may be presented to the Court of Appeal in an agreed statement. CRC 8.134. An agreed statement is rarely used to designate documents because they are rarely more advantageous than an appendix or CT.

A Settled Statement

Settled statements are more often used to present the record of oral proceedings to the Court of Appeal, but they also can be used to present the record of documentary evidence. CRC 8.120; CRC 8.137. A settled statement is rarely used to designate documents because the Appellant has to show that a substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court.

Helpful Tip

If the Notice to Designate the Record is not completed correctly the Superior Court will send a default notice. A party has 15 days from the date of the notice to fix the problem. Common mistakes include: APP-003 is missing information or has incorrect information on it or fees were not paid. Survivors can request that fees be waived, see pages 3-4.

Designating the Record: Oral Proceedings

There are three ways to designate oral proceedings as part of the record:

1) A Reporter's Transcript
2) Agreed Statements
3) A Settled Statement

The best way to designate oral proceedings as part of the record is by using a Reporter's Transcript.

Reporter's Transcript

Generally, a Reporter's Transcript should be requested to designate oral proceedings as part of the record. CRC 8.130. A Reporter's Transcript (RT) is the court reporter's written transcript of the oral proceedings in the Superior Court.

Procedure for Requesting the Reporter's Transcript

a. List the date of each oral proceeding to be included in the RT on form APP-003.
b. The form must be served on each known court reporter who transcribed each oral proceeding.
c. You can find the names of the court reporters on the court's minute orders. If you are unable to locate the name of the reporter, the clerk will also provide notice to the court reporter(s).
d. The Appellant must also deposit the approximate cost of preparing the RT.

Calculating the Cost

The court reporter can provide an estimate: $650/day (more than 3 hours of court time), or $325 per fraction of a day (less than 3 hours of court time).

As discussed on pages 3-4, survivors often cannot afford the cost of the transcripts needed for an appeal. When survivors cannot pay for the transcript, they can file (a) the court reporter's written waiver of the deposit, (b) a copy of a Transcript Reimbursement Fund application (see below), or (c) a certified transcript of the proceedings. In cases where none of these options work, FVAP may request that pro-bono counsel purchase the transcripts.

If the Survivor is the Respondent

Within 10 days after service of Appellant's Notice Designating Record on Appeal, the Respondent may file and serve a notice designating additional proceedings to be included in the RT.

The Respondent must pay the cost for any additional proceedings to be transcribed.

If the Appellant chooses not to designate a RT, the Respondent may not designate a RT without obtaining an order from the Court of Appeal.

Helpful Tip: Timing of RT

Although court reporters have 30 days after they received notice from the Appellant or the clerk to prepare the RT, it is not unusual for it to take 2-3 months for the RT to be completed because reporters can ask the court for an extension.

After the RT is completed, the Superior Court will send it to the Court of Appeal.

If the Appellant also requested a Certified Transcript, this will be sent to the Court of Appeal at the same time as the RT.

This is the date the record is "filed," triggering the deadline for Appellant's opening brief to be filed, 40 days later.

Transcript Reimbursement Fund

Transcript Reimbursement Fund applications are submitted to the Court Reporters Board and governed by Business & Professions Code section 8030.2 *et seq*. *See also* https://www.courtreportersboard.ca.gov/trf/index.shtml

Note**: *The amount for pro per litigants is limited to $2,500*.

Transcript Reimbursement Fund applications must be submitted on the application form (https://www.courtreportersboard.ca.gov/trf/index.shtml) and must include an invoice for the cost of preparing the RT. If the Court Reporters Board grants the application, the court reporter will begin preparing the RT. If the application is denied, the Appellant has 30 days after the denial is mailed to deposit the fees.

It is likely that FVAP may submit a Transcript Reimbursement Fund application on behalf of its clients.

Please review the current status of the laws and regulations before submitting an application.

If reimbursement through the fund is not possible, FVAP asks pro bono counsel to cover this cost if possible, because many survivors cannot afford it.

Agreed Statement

Oral proceedings may be designated wholly or partly by an "agreed statement." The statement must be signed by both parties. CRC 8.134 explains the procedure for filing an agreed statement.

Settled Statement

Although rare, a settled statement may be used instead of a Reporter's Transcript. CRC 8.137 explains the procedure for filing settled statements.

A settled statement or agreed statement may be the only option for presenting the record of oral proceedings to the Court of Appeal when the oral proceedings were not recorded by a court reporter or an audio proceeding. Unfortunately, this is a practice that is increasing common in family law and domestic violence courts.

4) Briefing

Despite growing societal awareness about gender-based violence, trial courts continue to routinely discount survivors' stories of abuse and make decisions that harm survivors and their children. Trial courts often rely on outdated myths and beliefs, such as thinking that abuse did not occur because a survivor continued to live with the person who abused them after being physically or emotionally harmed, in making their decisions. In one case, for example, the trial court denied the domestic violence restraining order requested because it determined that a woman was not raped by her husband because they were married, she had consensual intercourse with him at other times, and had not separated from him.

Additionally, trial courts often fail to recognize that behaviors which appear innocuous to the outside observer is threatening to the survivor due to the past. Consider this example that Evan Stark provides in *Coercive Control*: How Men Entrap Women in Personal Life: A women has been pitching very effectively for her team in a co-ed softball game. During the game her husband brought her a sweater. Outsiders observing this isolated act might only see a kind, loving husband. For the woman on the mound, however, this subtle and seemingly innocuous gesture has a much greater meaning. In the past, her husband physically beat her when she played well in these games. So, in this broader context, her husband handing her the sweater was a subtle signal that abuse would potentially be forthcoming if she continued to play well. If the court refuses to hear, dismisses, or is not made aware of this broader context, a survivor's need for protection and their response to the abuse is often incomprehensible.

Because the family court system so often dismisses survivors and the abuse, representing survivors in appeals is an art. It involves weaving together the survivors' story, explaining the

dynamics of gender-based violence and how it operated in this particular case and arguing the law. It involves remaining thoughtful about the bigger picture in your case, such as the whole history of abuse, what if any circumstances have changed in the survivors' life since the appeal started, and whether filing appellate documents will increase the potential risk of harm to a survivor. It also often involves pushing the envelope because the courts have discounted gender-based violence and how trauma impacts survivors and misapplied the law in gender-based cases. This might mean stepping outside of your comfort zone to make the necessary arguments.

Do not rely on the oral argument to win your case because appellate districts already will have drafted tentative rulings before oral argument – ie the case is typically won or lost on the briefs alone.

Filing of the Record

Once the Superior Court clerk, court reporter, and/or parties have finalized the record of the documentary and oral proceedings in the trial court, the record is "filed" with the Court of Appeal by the Superior Court clerk. The clerk will send the Appellant a copy of the record and notify the parties of the filing date. CRC 8.150.

Filing of the record is a main docket entry that also can be monitored on the Court of Appeal website (click on the "Case Information" link on your appellate district's website, enter the case number or party name, and then click "Docket"). Filing the record is an important date for you to monitor because it triggers the briefing schedule.

Briefing Schedule

The filing of the record with the Court of Appeal triggers the briefing schedule. Unless time is extended, the opening brief (mandatory) must be served and filed within 40 days after filing of the record on appeal. If no Reporters Transcript or Clerks Transcript has been requested, the deadline for the opening brief is 70 days after the Appellant elects to proceed without them, i.e., the date the Notice Designating Record on Appeal was filed. CRC 8.212(1).

The Respondent's brief must be served and filed within 30 days after the opening brief is filed; and the reply brief (optional) within 20 days thereafter. CRC 8.212(2), (3).

The filing date of a brief is the date of *actual delivery to the clerk's office*. As of January 1, 2020 all parties are required to file all documents electronically in the reviewing court. CRC 8.71. Briefs are electronically filed through TrueFiling.

Note: *A represented party may be excused from filing electronically if they show undue hardship or significant prejudice and self-represented parties are exempt from filing electronically.* CRC 8.71(b) and (d). A brief is deemed timely filed if, on or before the due date, it is mailed by *priority or express mail* or is *delivered to a common carrier for overnight delivery.* CRC 8.25(b)(3).

Practice Tip

The above deadlines are subject to change for two reasons:

1) If a party fails to timely file the Appellant's Opening Brief or the Respondent's Brief they are given 15 days to file the brief. CRC 8.220.

2) The parties may extend each filing period a maximum of 60 days by stipulation lodged with the Court of Appeal. Thereafter, time extensions are allowable only by the presiding justice for good cause. CRC 8.212(b); CRC 8.63. If you cannot obtain a stipulation from the opposing party, form APP-006 may be used to request an extension of time from the court, and they are usually granted.

Format

Rules CRC 8.204(b) provides formatting rules. Each appellate district also has local formatting rules, which may apply. Local rules can be found at https://www.courts.ca.gov/1dca-efile.htm

Some Formatting Rules:

- 13-point Font (FVAP's default font is Century Schoolbook)
- At least 1-½ line spacing
- Cannot exceed 14,000 words, including footnotes
- Must include a certificate stating the number of words in the brief
- Must contain an electronic bookmark to each heading, subheading, and first page of any component of the brief

Helpful Tip

Briefs should use California Style Manual (CSM) for citations. The CSM can be found here http://www.sdap.org/downloads/Style-Manual.pdf. Here is a CSM "cheat sheet." Here is a bluebook versus CSM comparison chart.

When partnering with FVAP on a brief, a "briefing schedule" will be developed. A briefing schedule provides dates when you will provide FVAP with the outline, First Draft, Second Draft, and sometimes a Third Draft of the brief for FVAP to review, edit, and provide comments on. Each iteration of the brief should be reviewed by a partner at your law firm before being sent to FVAP. The briefing schedule also provides dates for FVAP to return the drafts back to you for review and revision. The briefing schedule attempts to provide sufficient time for all parties to review and revise the brief and meet, if necessary, to discuss difficult arguments, to make it the best brief possible. Know that at least two, but usually three attorneys at FVAP will be reviewing each draft. We have determined that having this many eyes and perspectives (FVAP and your team!) help ensure we are presenting the best legal arguments possible and filing well-written briefs.

Appellant's Opening Brief

Being the Appellant is no easy feat. The Court of Appeal presumes that the trial court's decision is correct. The opening brief, thus, must persuade the justices that they should overturn the trial court.

The Appellate has the burden to:

1) Prove error, regardless of who had the burden of proof in the trial court.
2) Affirmatively show that the decision appealed from is an appealable order. Civ. Pro. Section 904.1 provides a list of appealable orders.
3) Affirmatively show how the Appellant was prejudiced by the trial court's error. "To establish prejudice, an Appellant must demonstrate that there was a reasonable probability that in the absence of . . . error, a result more favorable to the appealing party would have been reached." *In re Marriage of F.M. & M.M.*, 65 Cal. App. 5th 106, 118 (citation omitted).

Standard of Review

It is imperative to determine the standard of review for each issue in the case to determine whether you have an arguable and potentially successful appeal, and to present the best arguments in the brief. The standard of review determines the degree of deference the reviewing court gives to the trial court's decision. The standard of review should be provided for each issue on appeal.

There are three standards of review: 1) de novo, 2) abuse of discretion, and 3) substantial evidence. Brief descriptions of the standards of review are provided here and a video on standard of review can be found here.

De Novo: This is the most favorable standard of review because no deference is given to the trial court. Questions of law, statutory construction, and instructional issues are subject to de novo review. Constitutional issues are also generally reviewed de novo.

Abuse of Discretion: Under an abuse of discretion standard the Appellant must show that the trial court misapplied the law – used improper criteria or made incorrect legal assumptions. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (Gonzalez v. Munoz (2007) 156 Cal.App.4th 413, 420.)

Substantial Evidence. This standard generally applies to findings of fact. This is the most difficult standard of review to win on because the reviewing court gives extreme deference to the trial court as the trier of fact and determiner of credibility. "[T]he issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trier of fact." (In re *Marriage of Fregoso and Hernandez* (2016) 5 Cal.App.5th 698, 703.) Because this standard applies to findings of facts, making a substantial evidence argument requires that you provide a detailed statement of all of the testimony and evidence introduced at trial.

Whenever possible the Appellant should argue for the most beneficial standard of review that is reasonable under the circumstances, e.g. de novo review.

Brief Contents

The Appellant's Opening Brief (AOB):

- Must include a statement of basic background information, including the "nature of the action," the "relief sought in the trial court," the "judgment or order appealed from," and a "summary of the significant facts limited to matters in the record." CRC 8.204(a)(2)(A),(C)
- Must contain a statement of appealability (a statement that the appealed judgment or order is final or an explanation why the order is appealable). CRC 8.204(a)(2)(B)
- Must support references to matters in the record with citations. CRC 8.204(a)(1)(C).
- Must support each point raised by argument and, "if possible," citation to authority. CRC 8.204(a)(1)

Trial Exhibits

Trial Exhibits can provide additional proof that the trial court erred in its decision (or, if you are the Respondent, that the trial court's decision should be affirmed). If, for example, your client submitted numerous text messages where the other party was threatening to harm your client and/or calling your client names, it could demonstrate that the trial court abused its discretion in finding that abuse had not occurred.

Practice Tip

- Thoroughly review the record to determine which exhibits were admitted as evidence, which were admitted over objection, and which were not admitted.
- Obtain a complete set of the trial exhibits for both parties (this will be needed for both the brief and the Appendix.)

Practice Tip - Protective Measures: Motion to Seal, Motion for Use of Pseudonyms

Family law cases, particularly those involving gender-based violence, involve intimate details about survivor's lives which would be a part of the record on appeal. Your client may not want their identity to become readily accessible to the public because it could have negative ramifications for them and their children. To protect your client's (and their children's) identity you may file a Motion for Use of Pseudonyms, which allows the use of the client's first name and last initial or their initials in certain circumstances in the appellate opinion. The individuals that can make this request include "protected persons in domestic violence-prevention proceedings, children in all family court proceedings, and person's in other circumstances in which personal privacy interests support not using the person's name." CRC 8.90. A sample Motion for Use of Pseudonyms can be found here.

Sometimes, the record on appeal contains documents that are deemed confidential by statute. (CRC 8.47.) If there are any documents that are deemed confidential, you can request that the court seal the portions of the opening brief that reference the confidential records. To make this request you would file a Motion to Seal. If you are filing a Motion to Seal, you will need to submit an unredacted and redacted version of the opening brief. A sample Motion to Seal can be found here.

Practice Tip: Use of Social Science

Though your argument cannot rest on social science alone, social science can artfully be woven into briefs to educate the justices and enhance arguments. Social science can be particularly helpful in gender-based violence cases because inherent bias and stereotypes about how survivors ought to behave still infiltrate the legal system as does the discounting of abuse. As an example, here is a portion of a brief that weaves social science into the legal argument:

> But demonstrating abuse does not—and should not—require corroboration. The testimony of the survivor is sufficient on its own. (See *In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 703 ["The testimony of one witness, even that of a party, may constitute substantial evidence."].) The DVPA itself was amended in 2014 to specifically provide that a court may issue a restraining order "based solely on the affidavit or testimony of the person requesting the restraining order." (Fam. Code, § 6300, subd. (a), as amended by Stats. 2014, ch. 635, § 4, italics added.) [The Legislature specifically expanded the protections in 2014 because it observed that "[s]tudies 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." (*Id.* at § 1, subd. (f).)] This is a low bar, and deliberately so. Survivors "[are] often the only witnesses to the abuse." (Aiken & Murphy, *Evidence Issues in Domestic Violence Civil Cases* (2000) 34 Fam. L.Q. 43, 44.) Additionally, survivors often do not disclose abuse or even keep evidence of the abuse, such as photographs or text messages, for myriad reasons including fear of the consequences (e.g., increased violence), shame, and child custody issues. (Boethius & Akerstrom, *Revealing Hidden Realities: Disclosing Domestic Abuse to Informal Others* (2020) 21 Nordic J. of Criminology 186, 186-187; see also Aiken & Murphy, supra, at p. 44.)

AOB Practice Tips

- Writing a detailed outline helps organize the brief and flesh out arguments.
- Headings and subheadings matter. Justices often read these first and might even jump to certain sections of the brief based on the heading or subheading. It is important to make these concise and compelling.
- Determining the appropriate standard of review and how it applies in your case is essential to framing your arguments. A video on standards of review can be found here.
- Include all facts that you want to use in your arguments in your statement of facts.
- Include facts that are both favorable and unfavorable to your client.
- Support arguments with thorough research. Distinguish your case from unfavorable holdings in relevant cases. Include descriptive parentheticals when citing cases where appropriate.

Additional Tip!

One thing to note is while the appellate court usually must give deference to the trial court's findings of fact, the Code of Civil Procedure does authorize it to make "factual determinations contrary to or in addition to those made by the trial court" based on the evidence before the trial court. CCP § 909.

The Court of Appeal also may take additional evidence concerning facts "occurring at any time prior to the decision of the appeal." CCP § 909. If you have a case with serious flaws in the trial court's findings of fact or significant events between the trial court hearing and the opening brief in the Court of Appeal, it may be appropriate to ask the Court of Appeal not to defer to those findings. Please discuss such cases with FVAP.

Respondent's Brief

There are cases where a decision might be made not to file a Respondent's Brief. If a Respondent's Brief is not filed, the reviewing court may decide the case on the record, Appellant's Opening Brief, and Appellant's Oral Argument. A Respondent's Brief should be filed in circumstances such as when there is a concern that the trial court's ruling will be overturned, it is an unclear area of law, or a published opinion, which would benefit survivors, could result. The Respondent's Brief supports the trial court decision and should thoroughly discuss the legal issues raised in the Appellant's Opening Brief.

Practice Tips

- It is important to analyze the standard of review for each legal argument to determine whether the Appellant uses the correct one and if you can argue that a lower standard of review applies. The Appellant, for example, might frame the issue as the court abusing its discretion because the facts of the case warrant a different decision. As the Respondent, you could argue that the standard of review is not an abuse of discretion but rather substantial evidence because the Appellant is requesting that the appellate court review the trial court's factual findings. Because more deference is provided under the substantial evidence standard, this reframing helps the Respondent's position.
- Even if the trial court did make a mistake, the Respondent can argue that the error was not prejudicial and the judgement should not be overturned.
- If a Respondent's Brief is not filed, the Respondent may not participate in oral arguments.

Reply Brief

Though the Appellant is not required to file a Reply Brief, it is strongly encouraged that one is filed. Reply Briefs are incredibly important because they are the "last word" as the Respondent does not have the right to reply. Reply Briefs should not be a re-hashing of the arguments made in the opening brief and they cannot raise new issues. Rather, the Reply Brief should challenge the legal arguments raised in the Respondent's Brief.

Practice Tips

- Make notes on the Respondent's Brief.
- Outline and synthesize the Respondent's argument so you can determine what arguments need to be rebutted.
- Research any new cases cited in the Respondent's Brief. *Do the cases stand for the propositions cited for? Can they be distinguished from your case?*
- Make sure that cases cited in the opening brief are still valid.
- Make sure there are not any material flaws in the Respondent's recitation of the facts.

Amicus Brief

In some cases, a survivor has filed a pro se brief on an important legal issue. In these cases, FVAP and co-counsel have filed Amicus Briefs to remedy the deficiencies in the legal arguments presented in these briefs. More commonly, though, FVAP and co-counsel file Amicus Briefs in cases to highlight issues that impact numerous survivors, reoccurring errors that trial courts are making, novel arguments, and/or policy concerns. Amicus Brief often dive deeply into legislative history, social science research, and other academic articles to enhance arguments made by the survivor.

Practice Tip

The time limit for filing an Amicus Brief in State Court is much different than in Federal Court.

Amicus Brief Excerpt: Using Social Science and Research

"Abusers repeatedly go to extremes to prevent the survivor from leaving, including threatening to harm or kill them or their children, or ruining them financially, among other tactics. (Why Do Victims Stay? National Coalition Against Domestic Violence, [as of Sep. 24, 2022].)

Survivors fear their leaving will only escalate the violence and that they will have no financial means to support themselves or their children, which will lead to their homelessness. (Ibid.) These fears are not unfounded. There is a direct correlation between domestic violence and homelessness, with domestic violence being one of the leading causes of homelessness for women and their children. (The U.S. Conference of Mayors, Hunger and Homelessness: A Status Report on Hunger and Homelessness in America's Cities (2007) < http://www.ncdsv.org/images/USCM_Hunger-homelessness-Survey-inAmerica%27s-Cities_12%202007.pdf> [as of October 4, 2022] p. 12; Family and Youth Services Bureau, An Office for the Administration of Children and Families, Domestic Violence and Homelessness Statistics (2016) Fact Sheet (2016) [as of Sept. 23, 2022].) A disproportionate number of homeless women have experienced domestic violence and became homeless after fleeing from their abusers. (Berkeley Economic, Review Economic Abuse (2019) [as of Oct. 4, 2022] (hereinafter "Berkeley").) A study of women in California found that women who experienced interpersonal violence "within the last year were almost four times more likely to report housing instability than those who did not." (Pavaoet al., Intimate Partner Violence and Housing Instability (2007) 32 Am. J. Preventative Medicine 2,143, p. 145; see also Clough et al., "Having Housing Made Everything Else Possible": Affordable, Safe and Stable Housing for Women Survivors of Violence (2014) Qual. Soc. Work [as of Sept. 24, 2022].)"

Amicus Brief Excerpt: Using Legislative History (footnotes omitted)

"In 2020, the legislature passed Senate Bill 1141 ("SB 1141") to amend the DVPA. The express purpose of the amendment was: "to better protect victims of domestic violence by, first, codifying language from case law on destroying the other party's mental or emotional calm."[11] The Assembly Committee on Judiciary further explained that the amendment: provides that the definition of 'disturbing the peace of others' for which a restraining order can be issued under the DVPA, refers to conduct that, under the totality of the circumstances, destroys the other party's mental or emotional calm. This language is taken directly from recent cases.[12]

Here, the legislature's express intent was to better effectuate the original purpose of the DVPA and codify recent judicial clarifications from Nadkarni and McCord, among other decisions, finding that patterns of conduct that, in aggregate, inflict psychological harm are enjoinable abuse under the DVPA.[13]

To accomplish this stated purpose, SB 1141 added a new subdivision to Section 6320. As amended by SB 1141, Section 6320(c) states, in relevant part: As used in this subdivision (a), 'disturbing the peace of the other party' refers to conduct that, based on the totality of the circumstances, destroys the mental or emotional calm of the other party. This conduct may be committed directly or indirectly, including through the use of a third party, and by any method or through any means . . . . Thus, the statute now defines "disturbing the peace" as conduct that "destroys the mental or emotional calm of the other party," adopting the Nadkarni court's interpretation.

The 2020 amendment expressly extends protections to survivors of forms of abuse that are not necessarily rooted in physical harm. The amendment expansively states that disturbing the peace of another "may be committed directly or indirectly" and "by any method or through any means." (DVPA § 6320, subd. (c) (emphasis added).) This new definition captures the wide array of abusive conduct that negatively impact survivors' mental and emotional well-being."

5) Oral Argument

Once the briefing is complete, the case is ready for oral argument. The parties are entitled to participate in oral argument as a matter of right in any appeal considered on the merits and decided by a written opinion. *Moles v. Regents of Univ.of Calif.* (1982) 32 Cal.3d.867, 871; see also *Lewis v. Super.Ct. (Green)* (1999) 19 Cal.4th 1232, 1254. Unless provided otherwise by local rule, each side is allowed up to 30 minutes for oral argument. CRC 8.256(c).

In the First, Fourth, and Sixth Districts, the court initially notifies the parties that oral argument will be deemed waived unless one of the parties' requests oral argument within the time designated in the notice. Oral argument is requested by returning or completing the form for your district. (For example, the Fourth District, Division One uses this form: http://www.courts.ca.gov/documents/ltrlweb.pdf.) If a party requests oral argument, or if the court otherwise determines that oral argument would be helpful, the clerk's office then notifies the parties of the date, time, and place of the hearing.

In the Second, Third, and Fifth Districts the court will mail you a form after the case is fully briefed. You will indicate on this form whether you want to waive or have oral arguments. If you elect to have oral arguments you will state how much time you want to argue your case.

In the Second District, hearings are generally scheduled for two days each month, and the court entertains argument on those matters for which oral argument has not been waived by the parties.

If your case will proceed to oral argument, the clerk will notify you of the date at least 20 days before the scheduled date. CRC 8.256(b).

If you know ahead of time that there are dates that you are unavailable, such as planned vacation or a scheduled trial, you can indicate these dates on the oral argument form or via correspondence to the court that is served on all parties.

Remote vs. In Person

During the height of COVID, all districts moved to holding oral arguments remotely. Now, many districts are back to in-person arguments. However, most districts are operating under a hybrid model, allowing litigants to participate remotely if elected. Please check the court website to determine whether the district is holding in person, remote or hybrid arguments.

Preparing for Oral Argument

To help you prepare, FVAP will schedule 2 moot court sessions. Each session will give you time to practice arguments, obtain feedback, and work through any challenging questions that the court may ask. The moot court sessions are held in-person and/or via zoom. When zoom is used there is the option of recording the session to help you prepare. FVAP will also provide you with notes from the sessions to further help you prepare for oral arguments. To get the most out of each moot session, prepare for the sessions as if they are the actual oral argument.

Thoroughly know the arguments raised in both parties' briefs! In a recent oral argument, the justices asked the Respondent their position on whether legislators had deleted language from an earlier draft of a statue. The Respondent replied that they did not know about this despite the fact that the legislative history of the statute was cited in the Appellant's opening brief and the point was central to the Appellant's argument. You do not want to be in this position!

Practice Tips

- Practice, Practice, Practice!
- To get the most out of each moot session, prepare for the sessions as if they are the actual oral argument.
- Know the arguments and case law and have a system in place so you can easily locate key factual portions of the record.
- It is customary to request 10 or at most 15 minutes for oral argument, unless there are several extremely complex arguments at issue in the appeal.
- As a matter of practice, the court will extend your argument if they have additional questions for you that need to be resolved in order for them to decide the appeal. If they extend the time, the court will not cut off your reserved time for rebuttal if they use more than your allotted time to ask you questions.

Opinion

The opinion must be filed within 90 days of the submission date. Gov. Code § 68210 and Article 6, Section 19, Calif. State Constitution. Upon filing, the opinion is not yet considered final because the appellate court still has jurisdiction over the case for the next 30 days. Sometimes courts will make minor amendments to the opinion during this time. You cannot appeal the decision to the California Supreme Court until it is final, but, if you think you will do so, you should start planning to file the petition for review within the next 40 days.

30 days after the opinion was filed, a request for publication was granted, or an opinion was modified in a manner that changed the judgment, the opinion becomes final. The court cannot modify or change an opinion or grant rehearing after an opinion becomes final. Rules 8.264(b)(1), 8.264(b)(3), 8.264(c)(2), 8.268(a)(2), 8.268(c).

Petition for Rehearing

You may ask the appellate district to reconsider the case by filing a petition for rehearing within 15 days after the opinion is filed. CRC 8.268. Be sure to follow your district's local rules for petitions for rehearing.

Petition for Review to California Supreme Court

The deadline to file a petition for review at the Supreme Court is 10 days after the appellate decision becomes final. Rule 8.500(e).

Remittitur

A remittitur is the document filed by the Court of Appeal that returns jurisdiction over the case to the Superior Court. CRC 8.272. A remittitur will be filed 61 days after the opinion is filed (immediately after the period for granting Supreme Court review expires), barring any extensions by the Supreme Court. The remittitur alerts counsel to file all subsequent documents, including a memorandum of costs, with the Superior Court.

Other Motions to Consider

Motion for Calendar Preference

A Motion for Calendar Preference may be used to request that the reviewing court expedite the appeal schedule, which can include briefing and setting the date for oral argument. CRC 8.240. In most cases where you represent the Appellant you will be filing a Motion for Calendar Preference to expedite setting the date for oral argument. Motion for Calendar Preference may be filed in cases when a statute provides for trial preference. Advisory Com., Cal. Rules of Ct., rule 8.240. Family Code section 244 provides for statutory calendar preference in domestic violence restraining order cases. Family Code section 3023 provides for trial preference for contested child custody cases.

Practice Tips

- The granting of a Motion for Calendar Preference is discretionary.
- Generally, it is beneficial to file this when you represent the Appellant survivor because the trial court denied them orders that would help protect them and their children.
- Sample Motion for Calendar Preference here.

Motion to Consolidate Appeals

In some cases, you will be appealing different trial court orders for your client. Where the various appeals arise from the same family law proceedings and share parties, underlying facts, evidence, and legal issues, you will want to consider filing a Motion to Consolidate the Appeals. *Sampson v. Sapoznik* (1953) 117 Cal. App.2d 607, 609; *Sharick v. Galloway* (1936) 12 Cal.App.2d 733, 738. Consolidating the appeals expedites the matters, allowing the briefing, oral arguments, and decision to occur at the same time.

Practice Tips

- Include a proposed briefing schedule in the Motion.
- Include a proposed order in the Motion.
- Often used in cases where you are appealing a DVRO and a child custody order.
- Sample Motion to Consolidate Appeals here.

Motion for Costs in Superior Court

If you prevailed in the Court of Appeal, you may be able to recover your costs through the trial court. Costs include things like filing fees, and transcript preparation fees, but do not include attorney's fees. File a Memorandum of Costs with the Superior Court within **40 days** after the remittitur is filed by the Court of Appeal. See Rule 8.278 and Rule 3.1700 for more on memoranda of costs.

Though Rule 8.278 does not include attorney fees, a party may seek attorney fees on appeal if they are awardable by statute, contract, or law. Attorney's fees must be claimed by noticed motion filed by the same deadline as the Memorandum of Costs. See CCP § 1033.5(a)(10) & (c)(5); CRC 3.1702(c)(1). For example, Family Code 6344 states that court shall, upon request and after notice and hearing, order the payment of attorney fees and costs of the prevailing party petitioner.

Motion to Allocate Costs

The Court of Appeal has discretion to allocate costs of the appeal and may deny costs in the interest of justice. CRC 8.278(a)(4); CRC 278(a)(5). If you lose in the Court of Appeal, you may file a Motion to Allocate Costs (or a Motion to Deny Costs). As discussed above, survivors of gender-based violence are often economically insecure due to the violence. Filing a Motion to Allocate Costs (or a Motion to Deny Costs) could greatly assist your client financially. A sample Motion to Allocate Cost can be found here.

Motion for Judicial Notice

In some cases a Motion for Judicial Notice will be needed. Evidence Code sections 451, 452, 453, and 459 and CRC 8.252 governs Motions for Judicial Notice.

Procedure

- Must file a separate motion with a proposed order.
- Motion must include:
  - why the matter to be noticed is relevant to the appeal;
  - whether the matter to be noticed was presented to the trial court, and if so what the ruling was;
  - if judicial notice was not taken by the trial court, why the matter is subject to judicial notice under the Evidence Code; and
  - whether the matter to be noticed relates to proceedings after the order on appeal.

Practice Tips

- Use this motion if you are using legislative history that was not provided to the trial court.
- Use this motion if you want to cite to the docket or a judgment in a parallel proceeding, for instance to show that the order on appeal is a post-judgment order because there was a previous parentage judgment with a different case number.
- Sample Motion for Judicial Notice here

[i] Sussman, E.A. & Wee, S. (2016). Accounting for survivors' economic security: An atlas for direct service providers, mapbook 1. From The Center for Survivor Agency & Justice: www.csaj.org/library.

[ii] Sussman, E.A. & Wee, S. (2016). Accounting for survivors' economic security: An atlas for direct service providers, mapbook 1. From The Center for Survivor Agency & Justice: www.csaj.org/library.

[iii] Id.

[iv] Id.

[v] Id. In one study, which focused on Hispanic or Latinx, Black, Indigenous, Queer, Non-cisgender, Immigrant, and Disabled Survivors, "survivors reported an average of $10,120 in abuse related cost." "Research by the Centers for Disease Control and Prevention (CDC) estimates that the **lifetime cost** of intimate partner violence (IPV) for a female survivor is **$104,000**." Free Form, Support Every Survivor, https://www.freefrom.org/wp-content/uploads/2022/08/Support-Every-Survivor-PDF.pdf