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ABOUT CJER

The California Center for Judicial Education and Research (CJER), as the Education Division of the Administrative Office of the Courts (AOC), is responsible for developing and maintaining a comprehensive and quality educational program for the California judicial branch. Formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association, CJER supports the Chief Justice, the Judicial Council, and the courts by providing an extensive statewide educational program for judicial officers and court staff at both the trial and appellate levels. It includes orientation programs for new judicial officers, court clerks, and administrative officers; continuing education programs for judicial officers, court administrators, and managers; an annual statewide conference for judicial officers and court administrators; video and audiotapes; and judicial benchbooks, benchguides, and practice aids.

Administrative Director
Administrative Office of the Courts

Contributing Author/Editor
Edith Schaffer, Esq.

CJER Project Staff
Barry Harding
Senior Attorney

Iris Okura
Senior Editor

Jenny Jones
Indexer

About This Benchbook

This 2010 edition of Domestic Violence Cases In Criminal Court updates the previous text and covers legislation and court rules effective July 1, 2010, and covers case law through 47 C4th, 182 CA4th. This benchbook was originally produced by the Family Violence Project of San Francisco as part of the first comprehensive judicial education program on domestic violence for criminal court judges in the country.

Consultants for Domestic Violence Cases in Criminal Court

Hon. Deborah B. Andrews
Superior Court of California,
County of Los Angeles

Hon. Lewis A. Davis
Superior Court of California,
County of Contra Costa

Hon. Mary C. Morgan
Superior Court of California,
County of San Francisco

Hon. Catherine D. Purcell
Superior Court of California,
County of Kern

Nancy K. D. Lemon, Esq.

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Introduction

§1.1 I. SCOPE AND PURPOSE OF BENCHBOOK

This benchbook is provided to assist criminal court judges presiding over domestic violence cases. The publication has been designed as an easy-reference guide to domestic violence law in criminal cases. It includes sections on pretrial release considerations, case dispositions before trial, preliminary hearing and trial issues, and sentencing.

Although the benchbook focuses primarily on the Penal Code, it also refers to family law and juvenile court statutes and cases where appropriate, since domestic violence issues appear in a variety of legal forums. In addition to coverage of Pen C §273.5, there are sections on stalking and criminal threats, both of which occur frequently in domestic violence cases. Although the main emphasis is on cases in which the batterer is the defendant, there is also some discussion of instances in which the domestic violence victim is charged with a crime.

Increasingly, the need has been recognized for all branches of the justice system to handle domestic violence cases in a consistent manner and with the same base of knowledge. To this end, specialized procedures and educational programs on domestic violence have been implemented throughout California. New law enforcement officers are required by statute to attend eight hours of specialized domestic violence training. See Pen C §13519(c). Experienced officers must receive periodic domestic violence updates as part of their advanced officer training. See Pen C §13519(e). Many probation departments also include domestic violence training for their officers.

The California District Attorneys Association provides a series of courses on the prosecution of domestic violence cases. CJER and the California Judicial Council sponsor judicial training and conferences on domestic violence issues, which are mandated by Govt C §68555. This benchbook was prepared as part of a larger effort to develop programs and curricula for criminal court judges when handling these often complicated and difficult cases.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/1 Introduction/ II. LEGAL FRAMEWORK/§1.2 A. Definitions of Domestic Violence

II. LEGAL FRAMEWORK

§1.2 A. Definitions of Domestic Violence

Under the Penal Code, "domestic violence" is defined as "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." Pen C §13700(b). "Abuse" is defined as 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 to another. Pen C §13700(a).

In contrast, under the Domestic Violence Prevention Act (Fam C §§6200 et seq), "domestic violence" is defined as abuse perpetrated against any of the following persons (Fam C §6211):

(1) A spouse or former spouse;

(2) A cohabitant or former cohabitant, as defined in Fam C §6209;

(3) A person with whom the respondent is having or has had a dating or engagement relationship;

(4) A person with whom the respondent has had a child, when the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act, Fam C §§7600 et seq;

(5) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, when the presumption applies that the male parent is the father of the child to be protected; and

(6) Any other person related by consanguinity or affinity within the second degree.

For purposes of this act, "abuse" means (1) intentionally or recklessly causing or attempting to cause bodily injury; (2) sexual assault; (3) placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another; or (4) engaging in any behavior that has been or could be enjoined under Fam C §6320. Fam C §6203.

Penal Code sections referencing domestic violence as defined by Pen C §13700(b) include:

- §136.2(a)(7)(B)(i), (e)—Orders to protect crime victims and witnesses;
- §166(c)(1)—Criminal contempt;
- §273.83(a)—Individuals subject to spousal abuser prosecution effort;
- §853.6(a)(2)—Procedure on arrest for misdemeanor violation of protective order;
- §868.8—Providing for the comfort and support of witnesses who are minors or who have a disability;
- §1050—Showing of good cause for purposes of obtaining a continuance in cases involving domestic violence; and
- §1387(b)—Effect of dismissal of a domestic violence case.

Statutes that define domestic violence by reference to Fam C §6211 include:

- Evid C §1037.7—Domestic violence victim-counselor privilege;
- Evid C §1107(c)—Expert testimony on intimate partner battering and its effects;
- Pen C §277(j)—Child abduction;
- Pen C §977(a)(2)—Requirement that accused be present for arraignment and sentencing if charged with misdemeanor domestic violence;
- Pen C §1203.097—Conditions of probation for domestic violence crime; and
- Pen C §1203.3(b)(1) —Requirement that judge hold hearing in open court and provide notice to prosecutor before modifying or terminating protective order in domestic violence cases.

Some statutes reference both Pen C §13700 and Fam C §6211 in defining domestic violence. See, *e.g.,* Pen C §273.75(a) (required criminal history search by prosecutor for consideration by court when setting bond or when releasing defendant); Pen C §679.05(a), (b)(1) (victim's right to have domestic violence advocate present at interviews with law enforcement). In other statutes related to domestic violence, the persons included in the definitions vary by relationship to the perpetrator, victim, or witness.

B. Offenses Involving Domestic Violence

§1.3 1. Penal Code §273.5: Inflicting Corporal Injury on Spouse, Cohabitant, or Co-Parent

Penal Code §273.5(a) sets forth the elements of the crime of inflicting corporal injury on a spouse, cohabitant, or co-parent:

(1) A person willfully inflicts a physical injury on his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child; and

(2) The injury inflicted results in a traumatic condition.

"Willfully" means a willingness to commit the act. It does not require an intent to violate the law, to injure another, or to acquire an advantage. Pen C §7(1). Thus, Pen C §273.5 is a general intent crime, not a specific intent crime. *People v Thurston* (1999) 71 CA4th 1050, 1055, 84 CR2d 221. The assailant need only have the purpose or willingness to commit the act. *People v Campbell* (1999) 76 CA4th 305, 308, 90 CR2d 315.

A defendant "willfully inflicts" a corporal injury on a person covered under Pen C §273.5 when a direct application of force by the defendant on the victim causes injury. *People v Jackson* (2000) 77 CA4th 574, 577-578, 91 CR2d 805. Thus, violation of the statute results only if the corporal injury results from a direct application of force on the victim by the defendant. 77 CA4th at 580 (victim was injured when she fell during attempt to escape from defendant; criminal liability under Pen C §273.5 does not extend to direct, natural, and probable consequences of the battery). The statute does not apply, however, to infliction of injury on a woman who is pregnant with the defendant's unborn child, unless she is the defendant's spouse or is a cohabitant. See *People v Ward* (1998) 62 CA4th 122, 125-129, 72 CR2d 531.

§1.4 a. Traumatic Condition

As used in Pen C §273.5, a "traumatic condition" is a condition of the body such as a wound or an external or internal injury, whether of a minor or serious nature, that is caused by physical force. Pen C §273.5(c). The requirement of an injury resulting in a traumatic condition differentiates this crime from lesser offenses. *People v Abrego* (1993) 21 CA4th 133, 137, 25 CR2d 736. Both simple assault and misdemeanor battery are lesser included offenses in a prosecution under Pen C §273.5. 21 CA4th at 137; *People v Gutierrez* (1985) 171 CA3d 944, 952, 217 CR 616.

Other offenses require higher degrees of harm to be inflicted before the offense they criminalize is committed. For instance, felony battery requires serious bodily injury. See Pen C §243(d). Felony assault requires force likely to produce great bodily injury. See Pen C §245(a)(1). In contrast, the Legislature has clothed persons in intimate relationships protected by Pen C §273.5 with greater protection by requiring less harm to be inflicted before the offense is committed. *People v Abrego, supra,* 21 CA4th at 137.

Accordingly, to support a conviction under Pen C §273.5, the injury may be of any variety and of a minor or serious nature. *People v Chaffer* (2003) 111 CA4th 1037, 1044, 4 CR3d 441. For example, there was sufficient evidence to support a conviction for corporal injury resulting in a traumatic condition on a cohabitant who testified that the defendant struck her with a rod used to open window blinds, which resulted in bruising. *People v Beasley* (2003) 105 CA4th 1078, 1085-1086, 130 CR2d 717. Soreness and tenderness are insufficient, however, without evidence of actual injury. Nor is emotional upset a traumatic condition under Pen C §273.5, absent evidence of physical injury. *People v Abrego, supra,* 21 CA4th at 136-138.

In *Abrego,* the defendant slapped or punched the victim five times in the face and head. The victim reported soreness and tenderness to the investigating officer. At trial, however, she testified that she had been drunk when struck and had felt no pain, that she had not been injured or bruised, and that she did not seek medical treatment. The officer responding to the scene did not observe any injuries. The court concluded that there was no evidence of physical injury and reduced the conviction to the lesser included offense of battery (Pen C §242). 21 CA4th at 138.

One can commit the crime of attempted battery of an intimate partner without causing a traumatic injury. Attempted injury on a person protected under Pen C §273.5(a) does not require a traumatic condition. *People v Kinsey* (1995) 40 CA4th 1621, 1627, 47 CR2d 769. See §1.9.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/1 Introduction/§1.5 b. Covered Categories: Cohabitants

§1.5 b. Covered Categories: Cohabitants

Penal Code §273.5 applies to spouses, former spouses, cohabitants, former cohabitants, and co-parents. Pen C §273.5(a). Holding oneself out as the husband or wife of the person with whom one is cohabiting is not necessary. Pen C §273.5(b). Cohabitation is not a necessary element of the offense when the parties are married. *People v Gutierrez* (1985) 171 CA3d 944, 947, 951, 217 CR 616 (victim and defendant separated three weeks before assault). The statute does not apply to assaults on parents of the offender, on children, or on other household members, *i.e.,* relatives or roommates. See Pen C §273.5(a).

Penal Code §273.5 does not define cohabitant. Courts construing the statute, however, have interpreted the term broadly to refer to those living together in a substantial relationship that is manifested, at a minimum, by permanence and sexual or amorous intimacy. The element of "permanence" in the definition refers only to the underlying "substantial relationship," not to the actual living arrangement. *People v Taylor* (2004) 118 CA4th 11, 18-19, 12 CR3d 693; see *People v Holifield* (1988) 205 CA3d 993, 997-1000, 252 CR 729 (decided when Pen C §273.5 was limited to cohabitants of opposite sex; analogizing to Pen C §13700(b), defining "cohabitant" as "two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship," and setting forth factors that may determine whether persons are cohabiting). Significantly, courts construing "cohabitant" under Pen C §273.5 have refused to impose a requirement that a quasi-marital relationship exist between the parties, although they have noted that Pen C §273.5 requires something more than a platonic, rooming-house arrangement. *People v Moore* (1996) 44 CA4th 1323, 1333, 52 CR2d 256; *People v Holifield, supra,* 205 CA3d at 999.

The requirement of permanence does not mandate exclusivity in the relationship. For purposes of criminal liability under Pen C §273.5, a defendant may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each and lives with each for significant periods. *People v Taylor, supra,* 118 CA4th at 19; *People v Moore, supra,* 44 CA4th at 1334-1335. Thus, a defendant who physically abuses a cohabitant cannot immunize himself or herself from criminal liability merely by living elsewhere on a part-time basis with one or more other persons while continuing to reside the rest of the time with the first partner and maintaining a substantial relationship with that person. 44 CA4th at 1335.

In addition, the fact that a couple's living arrangements may be unstable or transitory does not deprive them of statutory protection under Pen C §273.5. Nothing in the language of the statute excludes cohabitants who do not have a permanent residence. *People v Taylor, supra,* 118 CA4th at 19. The fact that a couple were living in a car at the time of the charged offense, or that they sometimes lived separately with other relatives during the period preceding the incidents charged under Pen C §273.5 did not preclude a finding that they were cohabitants at the time of the charged offenses. 118 CA4th at 19. See also *People v Belton* (2008) 168 CA4th 432, 437-438, 85 CR3d 582 (evidence that the defendant and the victim who lived together for two months, first in a room rental, then in friends' houses, in motels, and in a car constitutes substantial evidence of cohabitation for purposes of Pen C §273.5).

A sexual relationship between the victim and the defendant also is not a necessary prerequisite to a finding of cohabitation under Pen C §273.5. *People v Ballard* (1988) 203 CA3d 311, 249 CR 806. Thus, in *People v Ballard*, the trial court properly refused to instruct the jury that a sexual relationship was required for cohabitation. 203 CA3d at 319. In *People v Holifield,* the defendant and victim did not share income or expenses or hold themselves out as husband and wife. They had occasional sexual relations and did not share other activities. Defendant slept in the same bed with the victim when he stayed with her. However, the jury found that they lived together "for a substantial period of time, resulting in some permanency of the relationship" as required by the jury instruction given by the court. *People v Holifield, supra,* 205 CA3d at 1001-1002.

§1.6 c. Covered Categories: Co-Parents

Penal Code §273.5 applies to the infliction of injury on the mother or father of the defendant's child. See Pen C §273.5(a). For purposes of Pen C §273.5, a person must be considered the father or mother of another person's child if the alleged male parent is presumed the natural father under Fam C §§7611 and 7612. Pen C §273.5(d). Family Code §§7611 and 7612 create a rebuttable presumption that a person is a presumed father if he is married to the mother at the time of birth or within 300 days before birth; attempts to marry the mother before or after the birth, though the marriage is invalid; or receives the child into his home and openly holds out the child as his natural child. See Fam C §7611; *People v Mora* (1996) 51 CA4th 1349, 1354 n7, 59 CR2d 801. Exceptions include cases where the child was conceived through rape or statutory rape (Fam C §7611.5), or where another man is declared the father by a court (Fam C §7612).

Under the ordinary meaning of the statute, Pen C §273.5(a) applies to a biological father who batters the mother of his child. Penal Code §273.5(d) expands the reach of the statute to a presumed father, a man who has entered into a family relationship with the mother and child, regardless of whether he is the biological father. *People v Vega* (1995) 33 CA4th 706, 710-711, 39 CR2d 479. Thus, the uncontradicted testimony of a victim that the defendant is the father of her children is sufficient to bring her within the protection of Pen C §273.5. 33 CA4th at 711.

In *People v Mora*, the court upheld defendant's conviction under Pen C §273.5 for battering the mother of his child, despite the fact that both parties' parental rights had been terminated before the battering. The court reasoned that termination of parental rights affects the continuing legal relationship of parent and child but does not alter the biological fact of paternity. Penal Code §273.5 does not require a continuing parent-child relationship for its prohibition to apply. It requires nothing more than the historical fact of paternity to justify punishing a man for battering the mother of his child. 51 CA4th at 1356.

Penal Code §273.5 defines "mother" by referring to the presumption that a male parent is a natural father under Fam C §7611. However, the birth of a child is an essential prerequisite of each of the presumptions stated in Fam C §7611(a)-(e). By incorporating those provisions, Pen C §273.5(d) excludes pregnant women from the definition of "mother." A man cannot be the presumed father of a fetus. Accordingly, Pen C §273.5 does not apply to battery of a pregnant woman, even though the fetus she is carrying is conceived through sexual intercourse with the batterer. *People v Ward* (1998) 62 CA4th 122, 126, 72 CR2d 531.

§1.7 d. Continuous Course of Conduct

In general, when an accusatory pleading charges a defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied on to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. *People v Diedrich* (1982) 31 C3d 263, 280-283, 182 CR 354; *People v Melhado* (1998) 60 CA4th 1529, 1534, 70 CR2d 878. However, corporal injury to an intimate partner under Pen C §273.5 falls within the continuous course of conduct exception to this rule. *People v Thompson* (1984) 160 CA3d 220, 224, 206 CR 516. The evidence presented at trial indicated that the husband had engaged in repeated beatings and rapes of his wife over a 20-day period in addition to prior assaults. 160 CA3d at 223-226. The reviewing court held the election doctrine inapplicable, since Pen C §273.5 contemplates a continuous course of conduct of a series of acts over a period of time. "It is the continuing course of abuse which leads to prosecution and conviction." 160 CA3d at 225 (citing *People v Epps* (1981) 122 CA3d 691, 702, 176 CR 332).

Nevertheless, corporal injury of an intimate partner is not invariably charged as a continuous course of conduct. A prosecutor may charge a defendant with multiple acts as separate offenses in violation of Pen C §273.5. *People v Johnson* (2007) 150 CA4th 1467, 1473-1477, 59 CR3d 405; *People v Healy* (1993) 14 CA4th 1137, 1139-1140, 18 CR2d 274. In *Healy,* the defendant was convicted of multiple violations of Pen C §273.5 for multiple offenses against the same victim occurring over a two-week time period. The defendant cited *People v Thompson* in arguing that the prosecutor could charge only one count of intimate partner abuse for each victim. 14 CA4th at 1139. Noting that *Thompson* did not concern the prosecutor's power to charge multiple acts of abuse when each battery satisfies the elements of Pen C §273.5 and constitutes a crime, the appellate court upheld the convictions, stating that acts of abuse against a cohabitant or a spouse occurring over time may be charged as separate offenses under Pen C §273.5. 14 CA4th at 1140.

The courts have upheld convictions based on a continuous course of conduct in other cases involving repeated violence against an intimate partner, despite the failure of the prosecutor to elect the specific act relied on, or of the court to give a unanimity instruction. In *People v Jenkins* (1994) 29 CA4th 287, 297-300, 34 CR2d 483, repeated abuse over a six-month period and particularly vicious assaults on two occasions were found to constitute two counts of torture under Pen C §266 in a continuous course of conduct. Similarly, stalking under Pen C §646.9 has been held to be a continuous course of conduct crime to which the unanimity instruction requirement does not apply. *People v Zavala* (2005) 130 CA4th 758, 768-769, 30 CR3d 398. See §1.12.

§1.8 e. Attempt

The construction of attempt, intent, and traumatic condition under Pen C §273.5 was examined in *People v Kinsey* (1995) 40 CA4th 1621, 47 CR2d 769. The defendant was convicted of attempted injury on a cohabitant based on evidence that the defendant, who lived with his girlfriend, had shoved, screamed, and cursed at her, and had tried to "get at her" for an entire hour because she asked him to use an ashtray when he smoked. While being restrained by a friend, the defendant scratched the girlfriend, causing a 2½-inch bloody scratch on her neck, which resulted in a scar. 40 CA4th at 1625-1626. The court, noting that an attempt to commit a crime requires a specific intent to commit the crime and an ineffectual act towards its commission, rejected defendant's contention that attempted injury on a cohabitant also requires a resulting traumatic condition. 40 CA4th at 1627. (It is unclear why the court did not find the scratch to be a traumatic condition, since "traumatic condition" is defined in the statute as including any wound, "whether of a minor or serious nature." Pen C §273.5(c).) The court also rejected defendant's argument that there was insufficient evidence of his intent to cause a traumatic condition. The court concluded that the victim, who was eight months' pregnant by the defendant at the time of the attempted crime, was especially vulnerable to injury and that the jury reasonably concluded that the defendant had intended to cause her injury. 40 CA4th at 1628.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/1 Introduction/§1.9 2. Penal Code §243(e): Simple Battery Against Spouse, Cohabitant, Co-Parent

§1.9 2. Penal Code §243(e): Simple Battery Against Spouse, Cohabitant, Co-Parent

Penal Code §243(e) prohibits the commission of a battery against a spouse, former spouse, cohabitant, co-parent, fiancé, fiancée, or a person with whom the defendant has or previously had, a dating or engagement relationship. A defendant will usually be charged under Pen C §243(e) if the touching or contact with the victim does not result in physical injury. If physical injury occurs, the defendant can generally be charged under Pen C §273.5. Penal Code §243(e)(1) is a lesser included offense of Pen C §273.5. *People v Jackson* (2000) 77 CA4th 574, 580, 91 CR2d 805. But note that the definition of the protected parties under Pen C §243(e) is broader than that of Pen C §273.5; the commission of a battery against a fiancé, fiancée, or a person with whom the batterer has, or previously had, a dating or engagement relationship is not a lesser included offense.

§1.10 3. Penal Code §646.9: Stalking

Penal Code §646.9(a) sets forth the elements of the crime of stalking:

(1) A person willfully, maliciously, and repeatedly follows *or* willfully and maliciously harasses another person; and

(2) That person makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.

For purposes of Pen C §646.9, "harasses" means engaging in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. Pen C §646.9(e). "Course of conduct" means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Pen C §646.9(f).

For purposes of Pen C §646.9, "immediate family" means any spouse, parent, child, or any person related by consanguinity or affinity within the second degree. Also included in the definition of "immediate family" is any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household. Pen C §646.9(*l*).

"Credible threat" is defined as a verbal or written threat, including one made by using an electronic communication device, or a threat implied by a pattern of conduct, or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person who is the target of the threat in reasonable fear for his or her safety or for the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or for the safety of his or her family. Pen C §646.9(g). For purposes of this section, an "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. Pen C §646.9(h). "Electronic communication" has the same meaning as the term defined in 18 USC §2510(12). Pen C §646.9(h). See also Pen C §653m (electronic contact with intent to annoy as misdemeanor).

In determining whether a threat occurred, the court must consider the entire factual context, including the surrounding events and the reaction of the listeners. *People v Uecker* (2009) 172 CA4th 583, 598 n10, 91 CR3d 355.

It is not necessary to prove that the defendant actually intended to carry out the threat. Pen C §646.9(g). For further discussion of intent required under Pen C §646.9, see §1.11.

The present incarceration of a person making the threat is not a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of "credible threat." Pen C §646.9(g).

§1.11 a. Intent

To establish a violation of Pen C §646.9, it is not necessary to prove that the defendant actually intended to carry out the threat. See Pen C §646.9(g). It is enough that the threat causes the victim to reasonably fear for his or her safety, or for the safety of his or her immediate family, and that the accused makes the threat with the intent to cause the victim to feel that fear. *People v Falck* (1997) 52 CA4th 287, 297-299, 60 CR2d 624. Evidence of a defendant's past domestic violence toward the victim is relevant to show intent to place the victim or family members in fear for their safety and to show the victim's state of mind. *People v McCray* (1997) 58 CA4th 159, 171-173, 67 CR2d 872.

In addition, although the victim must be aware of the stalker's conduct, that awareness need not be contemporaneous with the course of conduct constituting the stalking. *People v Norman* (1999) 75 CA4th 1234, 1239, 1241, 89 CR2d 806 (although victim was absent from country at time of conduct constituting stalking, evidence supported conviction for stalking, when victim became aware of conduct afterwards, and testified at trial that he was still afraid of defendant and believed he was the object of a "mission" that defendant was capable of carrying out).

§1.12 b. Continuous Course of Conduct

Stalking under Pen C §646.9 has been held to be a continuous course of conduct crime to which the unanimity instruction requirement does not apply. *People v Jantz* (2006) 137 CA4th 1283, 1292-1293, 40 CR3d 875; *People v Zavala* (2005) 130 CA4th 758, 768-769, 30 CR3d 398. By definition, stalking requires multiple acts in a course of conduct, since Pen C §646.9(e) provides that "harasses" means engaging in a knowing and willful course of conduct. *People v Jantz, supra,* 137 CA4th at 1293; *People v Zavala, supra*, 130 CA4th at 769. Even when there are multiple threats, if they are similar and relatively contemporaneous in time, and the parties do not make any significant distinction between them, the continuous course of conduct exception applies. *People v Jantz, supra,* 137 CA4th at 1293.

c. Constitutionality

§1.13 (1) First Amendment Challenges

Penal Code §646.9 has been found not to infringe on free speech rights guaranteed by the United States and California Constitutions. *People v Borrelli* (2000) 77 CA4th 703, 717, 91 CR2d 851; see US Const, amend I; Cal Const art I, §2. The right to free speech is not absolute; the state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out threats falling outside the scope of First Amendment protection for punishment. 77 CA4th at 713-714. A threat falls outside First Amendment protection when a reasonable person would foresee that the context and import of the words used will cause the listener to believe that he or she will be subjected to physical violence. 77 CA4th at 715. The right to free speech does not include the right to repeatedly invade another person's constitutional rights of privacy and the pursuit of happiness through the use of acts and threats evidencing a pattern of harassment designed to inflict substantial emotional distress. 77 CA4th at 716.

In addition, the constitutionality of Pen C §646.9 has been upheld against the related charge of being overbroad. See, *e.g.*, 77 CA4th at 717-719; *People v Falck* (1997) 52 CA4th 287, 295-297, 60 CR2d 624. The defendant in *Borrelli* asserted that Pen C §646.9 is overbroad in encompassing every kind of threat. *People v Borrelli, supra,* 77 CA4th at 718-719. In rejecting this argument, the court pointed to the statutory requirement that the threat in question be made by one who willfully, maliciously, and repeatedly follows or harasses another, with the intent to place the victim in reasonable fear for his or her safety (see former Pen C §646.9(a)); that the threat be accompanied by a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and serves no legitimate purpose (see Pen C §646.9(e)); and that the threat be credible (see Pen C §646.9(g)). 77 CA4th at 719 (construing prior version of statute). Threats meeting these statutory requirements clearly present a danger to society, and are of a type that are not protected under the First Amendment. See 77 CA4th at 719.

In *Falck*, the defendant argued that Pen C §646.9 fails to specify that it prohibits only "true threats," those that are truly dangerous, and thus impermissibly prohibits protected speech. *People v Falck, supra*, 52 CA4th at 295-296. Noting that Pen C §646.9 requires, in pertinent part, (1) the intent to place the victim in reasonable fear of his or her safety, and (2) the making of a "credible threat," the court found that the statute limits its application to only those threats that pose a danger to society and thus are unprotected by the First Amendment. 52 CA4th at 296-297. See also *People v Halgren* (1996) 52 CA4th 1223, 1231, 61 CR2d 176 (Pen C §646.9 does not punish mere angry or emotional speech, but applies only when there has been a credible threat made with intent to instill fear for personal safety or safety of immediate family; such speech is not afforded First Amendment protection).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/1 Introduction/§1.14 (2) Due Process: Vagueness Challenges

§1.14 (2) Due Process: Vagueness Challenges

The statutory definition of stalking has survived a constitutional challenge for vagueness based on use of the word "repeatedly." See *People v Heilman* (1994) 25 CA4th 391, 30 CR2d 422 (construing prior version of Pen C §646.9). At the time of the offenses in *Heilman*, Pen C §646.9(a) provided in relevant part, "[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking." 25 CA4th at 398. The court found that "repeatedly" modified the word "follows" and not "harasses," and that there was sufficient evidence in the record to support the defendant's stalking conviction based on a harassment theory. 25 CA4th at 399. Even if the defendant was convicted under the willful, malicious and repeated following provision, the court held that "repeatedly" is a "word of such common understanding that its meaning is not vague. It simply means the perpetrator must follow the victim more than one time." 25 CA4th at 400; see also *People v McCray* (1997) 58 CA4th 159, 168-171, 67 CR2d 872 (stalking under Pen C §646.9 does not require repeated harassment to ensure conviction). In 2002, the Legislature amended Pen C §646.9(a) to make clear that the statute penalizes a defendant who willfully, maliciously, and repeatedly follows, or who willfully and maliciously harasses. See Pen C §646.9(a); Stats 2002, ch 832, §1.

In *People v Tran* (1996) 47 CA4th 253, 54 CR2d 650, the defendant challenged the definition of "harasses" in Pen C §646.9(e) as unconstitutionally vague. The defendant contended that the phrase "serves no legitimate purpose," has no definite meaning, and thus allows jurors to impose their own moral judgment on the defendant's actions, which the defendant may have believed had a legitimate purpose. 47 CA4th at 260. Noting that "[t]he statute must notify an ordinary person what conduct is prohibited in a way that he or she can reasonably understand" (47 CA4th at 259), the court found that the defendant's acts of threatening the victim with a knife or hammer, and chasing the victim's husband and infant son while wielding a long knife constituted acts that an ordinary person should reasonably understand were prohibited under Pen C §646.9, despite the defendant's belief that he acted with the "legitimate purpose" of trying to convince the victim to leave her husband. 47 CA4th at 260; see also *People v Ewing* (1999) 76 CA4th 199, 205-209, 90 CR2d 177 ("harasses," and words "alarms," "annoys," "torments," or "terrorizes," as used in Pen C §646.9, are not unconstitutionally vague, as they have clear and understandable dictionary definitions; Pen C §646.9 prohibits course of conduct directed at specific person that reasonable person would consider seriously alarming, annoying, or tormenting to reasonable person, and thus establishes standard of conduct that is ascertainable by persons of ordinary intelligence).

In *People v Halgren* (1996) 52 CA4th 1223, 1231-1232, 61 CR2d 176, the defendant challenged the definition of "credible threat" in Pen C §646.9 as vague, arguing that a mere harmless expression of anger or disappointment could fall within the statute, subjecting the speaker to criminal punishment. The court found that Pen C §646.9 provides sufficient notice of the conduct prohibited, and that the definition of credible threat is not impermissibly vague. 52 CA4th 1230. To meet the statutory definition, the threat must be made with specific intent to cause the victim to reasonably fear for personal safety or the safety of immediate family. Thus, it is the perpetrator's intent, rather than the definition of the conduct engaged in, which triggers applicability of Pen C §646.9, and restricts law enforcement officials' discretion in defining the crime. 52 CA4th at 1231, citing *People v Heilman, supra*, 25 CA4th at 401. In addition, making a credible threat alone is not punishable; mere expression of anger or emotion does not fall within Pen C §646.9. *People v Halgren, supra,* 52 CA4th at 1231 (construing prior version of statute).

In *People v Falck* (1997) 52 CA4th 287, 294, 60 CR2d 624, the defendant challenged the term "safety," as used in Pen C §646.9(a), which requires that the defendant make a credible threat with the intent to place the victim in reasonable fear for his or her safety, or for the safety of his or her immediate family. The court held that there was no need for "safety" to be defined by statute, since commonly accepted usage of the word, judicial interpretation in case law, a clear and understandable dictionary definition of "safety," and extensive usage in statutory and constitutional sources were sufficient to overcome the constitutional challenge. 52 CA4th at 294-295. See also *People v Borrelli* (2000) 77 CA4th 703, 719-721, 91 CR2d 851 ("safety" as used in Pen C §646.9(a) is not limited to only physical safety, and is not unconstitutionally vague).

Penal Code §646.9(b), stalking when a restraining order is in effect, was found constitutional in *People v McClelland* (1996) 42 CA4th 144, 49 CR2d 587. In *McClelland*, the defendant argued that it is unclear from Pen C §646.9(b) exactly what behavior in Pen C §646.9(a) is actually proscribed by the court order for a defendant to have violated Pen C §646.9(b), and thus the statutory scheme requires a comparison of the language of the restraining order with the language of Pen C §646.9(a). 42 CA4th at 151. In upholding Pen C §646.9(b), the court noted that, although it is true that subdivisions (a) and (b) of Pen C §646.9 must be read together, it is not the language of Pen C §646.9(a) and the language of the restraining order that must be harmonized. Rather, the defendant's behavior must have violated both Pen C §646.9(a) and the court order. Penal Code §646.9(b) serves the legislative purpose of providing enhanced punishment to stalkers who have been ordered to refrain from such conduct in civil proceedings, and thus have been warned that their behavior is unacceptable. 42 CA4th at 152.

§1.15 (3) Double Jeopardy Challenges

A defendant's stalking conviction under Pen C §646.9, following his or her conviction for contempt for violating a restraining order, does not violate the federal double jeopardy clause, which prohibits an individual from being tried twice for the same offense or any included offense. Penal Code §646.9(b) does not define a crime separate from stalking under Pen C §646.9(a), but rather creates a punishment enhancement. As such, it cannot be considered in the double jeopardy analysis. *People v Kelley* (1997) 52 CA4th 568, 576, 60 CR2d 653. In addition, the defendant's prosecution for stalking following conviction for misdemeanor contempt for violating a restraining order does not violate Pen C §654, which prohibits successive prosecutions for crimes arising out of the same course of conduct, when at least some of the acts giving rise to the defendant's stalking charge occurred after the prosecution for contempt. 52 CA4th at 574-576. In reaching this result, however, the court cautioned that because the case involved stalking, a crime predicated on a continuing course of conduct, it did not intend to suggest that the case applies to crimes completed by a discrete act. 52 CA4th at 576, n5. For further discussion of continuous course of conduct in context of Pen C §646.9, see §1.12.

§1.16 4. Penal Code §422: Criminal Threats

The crime of criminal threats can be divided into five constituent elements. *People v Toledo* (2001) 26 C4th 221, 227, 109 CR2d 315; *People v Maciel* (2003) 113 CA4th 679, 682, 6 CR3d 628. To prove a violation of Pen C §422, the prosecution must establish all of the following (*People v Toledo, supra,* 26 C4th at 227-228; see *In re George T*. (2004) 33 C4th 620, 630, 16 CR3d 61 (juvenile case)):

(1) The defendant willfully threatened to commit a crime that will result in death or great bodily injury to another person;

(2) The defendant made the threat with the specific intent that the statement be taken as a threat, even if there is no intent of actually carrying it out;

(3) The threat—which may be made verbally, in writing, or by means of an electronic communication device—is on its face and under the circumstances in which it was made, so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat;

(4) The threat actually causes the person threatened to be in sustained fear for his or her own safety or for the safety of his or her immediate family; and

(5) The threatened person's fear is reasonable under the circumstances.

For purposes of Pen C §422, the term "electronic communication device" includes telephones, cellular phones, computers, video recorders, fax machines, and pagers. Pen C §422. It has the same meaning as the term is defined in 18 USC §2510(12). Pen C §422. See also Pen C §653m (electronic contact with intent to annoy as misdemeanor). "Immediate family" means any spouse, by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who regularly resided in the household within the prior six months. Pen C §422.

§1.17 a Sustained Fear

Penal Code §422 requires the person threatened "reasonably to be in sustained fear for his or her own safety." *People v Allen* (1995) 33 CA4th 1149, 1156, 40 CR2d 7; *In re Ricky T.* (2001) 87 CA4th 1132, 1139, 105 CR2d 165; see Pen C §422(a). The requirement that the threats cause the victim "reasonably to be in sustained fear for his or her own safety" or for the safety of an immediate family member has both a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must be reasonable under the circumstances. *In re Ricky T., supra,* 87 CA4th at 1140; *People v Fierro* (2010) 180 CA4th 1342, 1348-1349, 103 CR3d 858.

In *People v Allen*, the court defined "sustained fear" as "a period of time that extends beyond what is momentary, fleeting, or transitory." 33 CA4th at 1156. Although the defendant in *Allen* was arrested within 15 minutes of threatening to kill the victim and her daughter while pointing a gun at the victim, the court held that "[f]ifteen minutes of fear of a defendant who is armed, mobile, and at large, and who has threatened to kill the victim and her daughter," was sufficient to constitute "sustained fear" under Pen C §422. The court also found the victim's knowledge of the defendant's prior conduct relevant in establishing that the victim was in a state of sustained fear. 33 CA4th at 1156 (victim knew that defendant had made a practice of looking inside her home, and had reported defendant's conduct to police on previous occasions). In contrast, momentary fear will not support a finding of sustained fear within the meaning of Pen C §422, especially in the absence of evidence indicating that the victim had knowledge of the defendant's prior threatening conduct. See *In re Ricky T., supra,* 87 CA4th at 1140.

§1.18 b. Nature of Threat

A criminal threat under Pen C §422 is the communication of an intent to inflict death or great bodily injury on another with the intent to cause the listener to believe death or great bodily injury will be inflicted on the person or a member of the person's immediate family. *People v Toledo* (2001) 26 C4th 221, 233, 109 CR2d 315; *People v Maciel* (2003) 113 CA4th 679, 683, 6 CR3d 628. Penal Code §422 requires that the threat be so unequivocal, unconditional, immediate, and specific that it conveys a gravity of purpose and an immediate prospect of execution of the threat. *In re Ricky T.* (2001) 87 CA4th 1132, 1137, 105 CR2d 165; see Pen C §422(a). The nature of the threat, however, cannot be determined only at face value. The circumstances surrounding the purported threat also must be examined to determine if the threat is real and genuine, a true threat. 87 CA4th at 1137; see *People v Bolin* (1998) 18 C4th 297, 337-340, 75 CR2d 412 (threat that appears conditional on its face can be unconditional under circumstances in which threat is made).

It is sufficient for conviction under Pen C §422 that defendant put his finger to his lips, said something like "shush" or "sh," then slid his finger across his throat. *People v Franz* (2001) 88 CA4th 1426, 1446-1448, 106 CR2d 773. In addition, a violation of Pen C §422 may be committed even when the threat is communicated to the victim through a third person. *In re David L.* (1991) 234 CA3d 1655, 1658-1659, 286 CR 398; *People v Felix* (2001) 92 CA4th 905, 911, 112 CR2d 311. When the defendant does not personally communicate a threat to the victim, the prosecution must show that the defendant specifically intended that the threat be conveyed to the victim. *In re Ryan D.* (2002) 100 CA4th 854, 861, 123 CR2d 193; *People v Felix, supra,* 92 CA4th at 913.

Penal Code §422 does not require that the threat be unconditional. *People v Bolin, supra,* 18 C4th at 337-338 n12. Imposing an "unconditional" requirement ignores the statutory qualification in Pen C §422 that the threat must be "so unconditional as to convey to the person threatened a gravity of purpose and an immediate prospect of execution." Use of the word "so" indicates that unequivocality, unconditionality, immediacy, and specificity are not absolutely mandated, but rather must be sufficiently present in the threat and in surrounding circumstances to convey gravity of purpose and the immediate prospect of execution to the victim. *People v Bolin, supra,* 18 C4th at 339-340; *People v Stanfield* (1995) 32 CA4th 1152, 1157, 38 CR2d 328. Language creating an apparent condition cannot save the threatener from conviction when the condition is illusory, given the reality of the circumstances surrounding the threat. A seemingly conditional threat contingent on an act highly likely to occur may convey to the victim a gravity of purpose and immediate prospect of execution. *People v Bolin, supra,* 18 C4th at 340; *People v Stanfield, supra*, 32 CA4th at 1158.

Thus, in *People v Dias* (1997) 52 CA4th 46, 54, 60 CR2d 443, the court held that the fact that some of defendant's threats were framed in "linguistically conditional terms" did not require reversal. Similarly, in *People v Martinez* (1997) 53 CA4th 1212, 1220-1221, 62 CR2d 303, the court rejected defendant's contention that his threats were too vague to specifically convey a threat of great bodily injury to the victim when the defendant yelled and cursed at the victim, telling the victim he would "get him," got within close proximity to his face, and displayed angry behavior to him. In addition, after making these threats, defendant set fire to the building in which the victim worked, an act that the court said was "clearly a crime which could result in death or great bodily injury." 53 CA4th at 1221.

§1.19 c. Not a Continuous Course of Conduct

Penal Code §422 has been held not to come within the continuous course of conduct exception to the requirement that a prosecutor elect which of several distinct acts the state relies on in charging the defendant when demanded by the defendant. *People v Salvato* (1991) 234 CA3d 872, 878, 883-884, 285 CR 837. The court in *Salvato* held that Pen C §422 focuses on an individual act—a threat—and therefore must be proved through specific separate instances. 234 CA3d at 883. Thus, the trial court's failure to require the prosecutor to make an election in charging defendant under Pen C §422 was prejudicial error that was not cured by the court in giving a unanimity charge at the end of the trial, when the defense was faced with evidence of numerous acts occurring over a three-month period. The prosecutor argued to the jury that this entire course of conduct violated Pen C §422, but the preliminary hearing did not provide defendant with notice of all these individual acts, and the defendant had different defenses to the several distinct acts, resulting in an unfocused, diffused, and confusing presentation that could have been prevented by requiring an election at the beginning of trial. 234 CA3d at 884.

§1.20 d. Constitutionality

Due Process: Vagueness. Penal Code §422 has been upheld as sufficiently certain and definite in context to provide actual notice to individuals of the prohibited conduct, and to provide minimal guidelines for law enforcement to prevent arbitrary and discriminatory application of the statute. *People v Maciel* (2003) 113 CA4th 679, 686, 6 CR3d 628. In *Maciel*, the defendant challenged the phrases, "crime which will result in" and "great bodily injury" in Pen C §422 as facially void for vagueness. 113 CA4th at 685, 686. Construing the challenged language in context, and taking into account the other elements that must be established for the statute to be triggered, the court found that Pen C §422 does not criminalize all threats of crimes that will result in death or great bodily injury, or leave to law enforcement to determine what threats will result in arrest. 113 CA4th at 685.

First Amendment Defense. When a defendant in a Pen C §422 case raises a plausible First Amendment defense, the reviewing court must make an independent examination of the record to ensure that the speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat. *In re George T.* (2004) 33 C4th 620, 632, 16 CR3d 61, citing *Bose Corp. v Consumers Union of U.S., Inc.* (1984) 466 US 485, 499, 104 S Ct 1949, 80 L Ed 2d 502. In conducting an independent review, the appellate court will defer to the trial court's witness credibility determinations, and to those findings of fact not relevant to the First Amendment issue, but will make an independent examination of the whole record, including a "de novo" review of the constitutionally relevant facts, to determine whether the speaker's speech was a criminal threat that is not entitled to First Amendment protection. *In re George T., supra*, 33 C4th at 635. After conducting such an independent review in *George T.*, the Supreme Court determined that a high school student who gave two classmates a poem labeled "Dark Poetry" that recited in part, "I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!" did not make a criminal threat under Pen C §422. The court concluded that the ambiguous nature of the poem, along with the circumstances surrounding its dissemination, failed to establish that the poem constituted a criminal threat. 33 C4th at 634-638.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/1 Introduction/§1.21 e. Attempt

§1.21 e. Attempt

The crime of attempted criminal threat is recognized in California, and has been upheld as not unconstitutionally broad. See *People v Toledo* (2001) 26 C4th 221, 230, 233-235, 109 CR2d 315. Attempted criminal threat is defined through the interplay of Pen C §422, and Pen C §§664 and 21a, the statutory provisions relating to attempt. 26 C4th at 230. Section 664 provides that every person who attempts to commit any crime is subject to the criminal punishment set forth in that provision. Applying Pen C §21a in the criminal threat context, a defendant properly may be found guilty of attempted criminal threat whenever the defendant, acting with the specific intent to commit the offense of criminal threat, performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. See 26 C4th at 230. A defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury. There is the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety. 26 C4th at 230-231.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/1 Introduction/§1.22 5. Other Criminal Violations

§1.22 5. Other Criminal Violations

In addition to the crimes discussed in §§1.3-1.21, other Penal Code violations that are often charged in domestic violence cases include:

- Assault (Pen C §240);
- Assault with deadly weapon, firearm, or force likely to produce great bodily injury (Pen C §245(a));
- Battery (Pen C §§242, 243);
- Child abduction (Pen C §§278, 278.5);
- Contempt of court (Pen C §166);
- Disturbing the peace (Pen C §647);
- Intimidating victim or witness (Pen C §136.1);
- Rape of spouse (Pen C §262);
- Telephone or electronic communication harassment (Pen C §653m);
- Trespass (Pen C §602); and
- Violation of domestic violence protective order (Pen C §273.6).

§1.23 III. DOMESTIC VIOLENCE COURTS

Court sessions in a growing number of California counties are now dedicated to domestic violence cases. Under legislative mandate, the Judicial Council conducted a descriptive study of the various domestic violence courts in California and other states, and reported to the Legislature on the policies and procedures used in these courts. The report, *Domestic Violence Courts: A Descriptive Study* (Judicial Council of California/AOC), was completed in 2000. The report additionally provided an analysis and rationale for the common features of these courts and to identify issues and potential obstacles to be considered in developing and implementing effective domestic violence courts at the local level. The study found that courts throughout the state had responded to the challenge of domestic violence cases in a variety of ways, making it difficult to identify one model or definition of domestic violence court (pp 1, 10-16). But the study found that, despite their differences, all the domestic violence courts are unified in their mission to enhance the safety of the victims of domestic violence and their children, and to ensure batterer accountability (pp 1, 10-16). The study also identified a number of potential obstacles to implementing effective domestic violence courts, including limited court resources, current policies and procedures, training and education, resistance of key participants, and case characteristics (pp 1, 24-28). The California Attorney General's Task Force on Local Criminal Justice Response to Domestic Violence made the following recommendation to the Judicial Council in a report entitled *Keeping the Promise: Victim Safety and Batterer Accountability* (p 85) (see §1.24):

> The Judicial Council should adopt a rule that would delineate model court practices and procedures for dedicated domestic violence criminal courts and specialty calendars. The various models would constitute best practices, taking geographic variation and county culture into account. Such courts, regardless of model, would be in the best position to:
>
> increase victim (adult and child) safety;
> assist victims (adults and children);
> increase batterers' accountability;
> improve case management; and
> use resources more efficiently.

The Family Violence Prevention Fund has produced a publication that provides guidance in developing a domestic violence court (see Sack, Creating a Domestic Violence Court: Guidelines and Best Practices (San Francisco, CA: Family Violence Prevention Fund, 2002).

§1.24 IV. ATTORNEY GENERAL AND JUDICIAL COUNCIL DOMESTIC VIOLENCE TASK FORCES

In 2005, the California Attorney General published a report entitled *Keeping the Promise: Victim Safety and Batterer Accountability.* This was written by the Attorney General's Task Force on Local Criminal Justice Response to Domestic Violence. It contains many recommendations on how criminal courts can improve their response to domestic violence.

In response to the report and to ensure the development of best practices in domestic violence cases, Chief Justice Ronald George appointed the California Judicial Council Domestic Violence Practice and Procedure Task Force staffed by the Center for Families, Children & the Courts of the Administrative Office of the Courts. In 2008, this task force released a comprehensive report entitled *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases* (Judicial Council of California/AOC, Center for Families, Children & the Courts (2008)). The guidelines and recommendations relate to court leadership, restraining and protective orders, firearms restrictions and relinquishment, and criminal procedure in domestic violence cases.

2

Pretrial Release

§2.1 I. OVERVIEW OF PRETRIAL RELEASE IN DOMESTIC VIOLENCE CASES

A report by the National Institute of Justice concluded that a victim of domestic violence is especially vulnerable to retaliation or threats by the defendant during the pretrial period. See Goolkasian, Confronting Domestic Violence: The Role of Criminal Court Judges, National Institute of Justice (NIJ): Research in Brief (Washington, D.C.: U.S. Department of Justice, 1986). Research also suggests that domestic violence tends to escalate when the victim leaves the relationship. National Crime Survey statistics show that in almost 75 percent of spousal assaults, the parties were divorced or separated at the time of the incident (Washington, D.C.: U.S. Department of Justice, 1983). See *People v Gutierrez* (1985) 171 CA3d 944, 949, 217 CR 616 ("the occasion of a separation among spouses ofttimes heightens the potential for angry confrontation"); *People v Ogen* (1985) 168 CA3d 611, 615, 215 CR 16 (detailing history of abuse escalating to rape and murder after victim moved away from former cohabitant).

This research demonstrates that a history of domestic violence may be a reliable indicator that further violence will occur. In addition, it appears that the victim may be particularly vulnerable to revictimization during attempts to leave or to sever the relationship. In view of these findings, the most important pretrial release consideration in domestic violence cases is the need to separate the parties and to protect the victim. Failure to do so may predictably result in recurring violence. For these reasons, many judges believe that the court should consider no bail in some cases, especially when there has been severe injury to the victim, a history of domestic violence, and threats of retaliation by the defendant. In most other cases, the court should set bail, reserving own recognizance release (OR) only for exceptional cases. In all cases in which the threat of continued violence or potential intimidation exists, the court should seriously consider issuing stay-away/no-contact orders to protect the victim, as required by Pen C §136.2(e)(1), regardless of the defendant's custodial status. It is not uncommon for an incarcerated defendant to continue contacting the victim by mail, by telephone, or through third parties.

II. SETTING BAIL

A. Applicable Constitutional and Statutory Provisions

§2.2 1. When Bail Is Available

California Constitution art I, §12, provides in part that a person must be released on bail with sufficient sureties, except for:

(1) Capital crimes when the facts are evident or the presumption is great;

(2) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption is great, and the court finds, based on clear and convincing evidence, that there is a substantial likelihood the person's release would result in great bodily harm to others; or

(3) Felony offenses when the facts are evident or the presumption is great, and the court finds, based on clear and convincing evidence, that the person has threatened another with great bodily harm, and that there is a substantial likelihood that the person would carry out the threat if released. In addition, the court cannot require excessive bail. Cal Const art I, §12; see *In re Nordin* (1983) 143 CA3d 538, 543-544, 192 CR 38 (denial of bail under Cal Const art I, §12(c) to defendant who threatened to murder sheriff's deputy did not violate guarantee against excessive bail under Eighth Amendment to United States Constitution).

In setting, reducing, or denying bail, the court must consider the following factors:

- *Safety of public and victim.* The protection of the public and the safety of the victim are the primary considerations in determining the proper amount of bail. Cal Const art I, §28(f)(3); Pen C §1275(a).
- *Safety of the victim's family*. Cal Const art I, §28(b)(3).
- *Seriousness of the charged offense.* Cal Const art I, §§12, 28(f)(3); Pen C §1275(a). In weighing the seriousness of the offense, the court must consider the alleged injury to the victim, the alleged threats to the victim or witness to the offense, the alleged use of a firearm or other deadly weapon in the commission of the offense, and the alleged use or possession of controlled substances by the defendant. Pen C §1275(b). If the defendant is charged with a narcotics offense (Health & S C §§11350-11392), the court must consider the alleged amount of the controlled substances involved in the commission of the offense and whether the defendant is currently released on bail for another narcotics violation. Pen C §1275(b).
- *Previous criminal record of the defendant.* Cal Const art I, §§12, 28(f)(3); Pen C §1275(a).
- *Probability of the defendant's appearing at the trial or hearing of the case*. Cal Const art I, §§12, 28(f)(3); Pen C §1275(a).

In addition, if a defendant is arrested without a warrant for a bailable felony offense, or for a misdemeanor violation of a domestic violence restraining order, the court may set bail in an amount that it deems sufficient to ensure the defendant's appearance, or to ensure the protection of the victim or the victim's family members, on the filing of a declaration by a peace officer setting forth supporting facts and circumstances. Pen C §1269c. Bail of $1 million set for a defendant arrested under Pen C §273.5, enhanced from the $50,000 listed in the county's felony bail schedule to ensure protection of the victim under Pen C §1269c, has been held not excessive under the Eighth Amendment, absent a showing by the defendant that bail was enhanced for an improper purpose or that it was higher than necessary to achieve a valid state interest. *Galen v County of Los Angeles* (9th Cir 2007) 477 F3d 652, 659.

§2.3 2. Bail Hearing

A noticed hearing must be held in open court before a defendant is released on bail in an amount that is either more or less than the amount indicated in the bail schedule if the defendant is arrested for any of the following crimes (Pen C §1270.1(a); Cal Const art I, §28(f)(3)):

- A serious felony, as defined in Pen C §1192.7(c), which includes intimidation of a victim or witness in violation of Pen C §136.1, and criminal threats in violation of Pen C §422 (see Pen C §1192.7(c)(37), (38)); or a violent felony, as defined in Pen C §667.5(c);
- Pen C §136.1 punishable under Pen C §136.1(c)—intimidation of witness or victim;
- Pen C §243(e)(1)—battery against spouse; cohabitant; co-parent; noncohabitating former spouse, fiancé, fiancée; or person with whom defendant has or had dating or engagement relationship;
- Pen C §262—spousal rape;
- Pen C §273.5—corporal injury of spouse, former spouse, cohabitant, former cohabitant, or co-parent;
- Violation of protective order under Pen C §273.6 where the defendant made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;
- Felony violation of Pen C §422—criminal threats; and
- Pen C §646.9—stalking.

For example, a prerelease bail hearing must be held for any person charged with spousal rape in concert with another person. See Pen C §§1270.1(a)(1), 667.5(c)(18), 264.1, 262. Penal Code §1270.1 applies to both the misdemeanor violations and felonies listed in the statute. *Dant v Superior Court* (1998) 61 CA4th 380, 388-389, 71 CR2d 546 (upholding application of Pen C §1270.1 to misdemeanor violation of Pen C §273.5).

Under Pen C §1270.1, the prosecutor and defense attorney must be given two court days' written notice of the bail hearing and an opportunity to be heard. If the defendant does not have counsel, the court must appoint counsel for purposes of the bail hearing. Pen C §1270.1(b). The court must hold the hearing within the time prescribed by Pen C §825, meaning that the hearing generally must be held within 48 hours after the defendant's arrest, excluding Sundays and holidays. Pen C §§1270.1(b), 825(a).

If a defendant is charged with a serious felony, as defined in Pen C §1192.7(c), the victim must be given notice and reasonable opportunity to be heard at the bail hearing. Cal Const art I, §28(f)(3).

At the hearing, the court must consider evidence of past court appearances by the defendant, the maximum potential sentence that could be imposed, and the danger posed to other persons if the defendant is released. In determining whether to release the defendant on his or her own recognizance, the court must consider potential danger to other persons, including threats made by the defendant and any past acts of violence. The court also must consider any evidence offered by the defendant regarding his or her ties to the community and ability to post bond. Pen C §1270.1(c).

If the judge or magistrate sets bail other than as provided in the bail schedule, the record must reflect the reasons for the decision and must address the issue of threats to the victim or witness. Pen C §1270.1(d). In addition, before a court may reduce bail below the amount established by the bail schedule for a person charged with a serious felony as defined in Pen C §1192.7, or a violent felony as defined in Pen C §667.5(c), the court must make a finding of unusual circumstances and must set forth those facts on the record. In this context, "unusual circumstances" does not include the fact that the defendant has made all prior court appearances or has not committed any new offenses. Pen C §1275(c).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/2 Pretrial Release/§2.4 3. Prosecutorial Investigation Requirement

§2.4 3. Prosecutorial Investigation Requirement

In cases in which the defendant has been charged with domestic violence as defined by Pen C §13700 or Fam C §6203 or §6211, the prosecutor must perform a thorough search for prior convictions of the defendant for domestic violence, prior violent or weapons offenses, or for current protective or restraining orders issued against the defendant by any civil or criminal court. Pen C §273.75(a). The prosecutor must present this information to the court for consideration in setting bail or determining whether to release the defendant on OR at arraignment. See Pen C §273.75(a). In determining bail or release in such cases, the court must consider the safety of the victim, of the victim's children, and of other persons who may be in danger if the defendant is released. Pen C §273.75(a).

§2.5 4. Bail in Stalking Cases

When a defendant who has been charged with stalking under Pen C §646.9 is released on bail, the incarcerating facility must make available to the public a telephone number for inquiries about bail status or to determine if the person arrested has been released, and if not yet released, the scheduled release date, if known. See Pen C §646.93(a). If there is a request to lower bail in such cases, it must be heard in open court in accordance with Pen C §1270.1. In addition, the victim must be given notice and reasonable opportunity to be heard at the hearing. Cal Const art I, §28(f)(3). See also Pen C §646.93(b) (prosecutor must make all reasonable efforts to notify the victim, who is entitled to attend the hearing and to address the court on the issue of bail).

Unless good cause is shown, the court must impose the following additional conditions as a prerequisite to release on bail in stalking cases (Pen C §646.93(c)):

(1) The defendant must not initiate contact with the alleged victim in person, by telephone, or by any other means;

(2) The defendant must not knowingly go within 100 yards of the victim, or his or her workplace or residence;

(3) The defendant must not possess firearms or other deadly or dangerous weapons;

(4) The defendant must obey all laws; and

(5) The defendant, on request at the time of his or her court appearance, must notify the court of his or her address and telephone number at home and work.

Violation of any of these conditions may result in issuance of a no-bail warrant. Pen C §646.93(c).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/2 Pretrial Release/§2.6 B. Checklist: Bail for Domestic Violence Offenders

§2.6 B. Checklist: Bail for Domestic Violence Offenders

1. Preliminary Considerations

(a) Felonies

- Capital crime when proof evident or presumption great—release prohibited. Cal Const art I, §12(a); Pen C §1270.5.
- Offense involves acts of violence or felony sexual assault on another person, when facts are evident or presumption great, and court finds clear and convincing evidence of substantial likelihood that defendant's release would result in great bodily harm to others—release prohibited. Cal Const art I, §12(b).
- Felony offense when facts are evident or presumption great, and court finds based on clear and convincing evidence that defendant has threatened another with great bodily harm and that there is substantial likelihood that defendant would carry out threat if released—release prohibited. Cal Const art I, §12(c).
- All other felonies—release on nonexcessive bail as a matter of right. Pen C §1271.
- Hearing required, with notice to prosecutor and defense attorney, before person arrested for a serious or violent felony, for violation of Pen C §136.1(c), §243(e)(1), §262, §273.5, §273.6, §422, or §646.9 may be released on bail higher or lower than county bail schedule. See Pen C §1270.1. In addition, the victim must be given notice and reasonable opportunity to be heard at the hearing if the defendant is charged with a serious felony, as defined in Pen C §1192.7(c). Cal Const art I, §28(f)(3).

(b) Misdemeanors

- Bail deviation hearing for Pen C §243(e)(1), §273.5, §273.6, or §646.9 violations. Pen C §1270.1. (Note that Pen C §§273.5 and 646.9 are wobblers; second or subsequent conviction of Pen C §273.6 is wobbler.)
- Other offenses—release as a matter of right. Pen C §1271.

(c) All cases

- Public safety and safety of the victim are the primary considerations in setting, reducing, or denying bail. Cal Const art I, §28(b)(3), (f)(3). The safety of the victim's family must also be considered. Cal Const art I, §28(b)(3).

2. Pen C §1275 Considerations

(a) Protection of Public

- Danger posed to public. See *U.S. v Salerno* (1987) 481 US 739, 107 S Ct 2095, 95 L Ed 2d 697 (authorization of pretrial detention based on future dangerousness under Bail Reform Act, 18 USC §3142(e), is permissible regulation not violative of substantive due process, and does not constitute impermissible punishment before trial); *U.S. v Freitas* (ND Cal 1985) 602 F Supp 1283, 1288 (Eighth Amendment does not forbid pretrial detention based on dangerousness under federal Bail Reform Act).

(b) Seriousness of Offense Charged

- Possible penalty for offense charged. Pen C §1275(a); see *Van Atta v Scott* (1980) 27 C3d 424, 438 n12, 166 CR 149 (court must consider severity of sentence detainee faces, though this factor should not be considered dispositive except for most serious offenses; construing former version of Cal Const art I, §12).
- Weight of evidence against defendant. See *Van Atta v Scott, supra*.
- Victim's alleged injuries. Pen C §1275(a).
- Alleged threats against victim or witness. Pen C §1275(a).
- Alleged use of a firearm or other deadly weapon. Pen C §1275(a).
- Availability of weapons. See Pen C §12028.5 (connection between domestic violence and weapons); *In re Nordin* (1983) 143 CA3d 538, 542-543, 192 CR 38 (under Cal Const art I, §12(c), pretrial release on bail properly denied to defendant who threatened to kill sheriff's deputy when evidence showed that defendant

owned weapons, and court found substantial likelihood that defendant would carry out threat if released).

- Alleged use or possession of a controlled substance. Pen C §1275(a).
- Children involved as victims or witnesses. See generally Pen C §§136.1(c)(1), 422.
- Violation of domestic violence restraining order. Pen C §1275.

(c) Defendant's Previous Criminal Record

- Prior history of convictions, including domestic violence. See Pen C §§1275(a), 273.75(a).
- Prior history of police incident reports or arrests not leading to convictions, including domestic violence. See Pen C §§1204.5, 1275.
- Prior history of violence or weapons offenses. See Pen C §273.75(a).
- Any current protective or restraining order issued by civil or criminal court. See Pen C §273.75(a).

(d) Probability of Defendant Appearing at Hearing or Trial

- Past record of failure to appear in criminal cases and prior flight to avoid prosecution.
- Ties to community, other than through victim.
- Employment status, duration, source of income.
- Residence, other than through victim.
- Whether defendant owns or rents home.
- Duration of stay at current residence.
- Probation/parole status.
- Citizenship/immigration status.
- Bench warrant history.

3. Pen C §1269c Considerations

- Defendant has been arrested without warrant for bailable felony offense or for misdemeanor offense of violating domestic violence restraining order.
- Bail may be set in amount sufficient to ensure defendant's appearance or protection of victim or family member of victim of domestic violence, on appropriate terms and conditions, on request by peace officer.
- Peace officer must file supporting declaration under penalty of perjury showing reasonable cause to believe amount in bail schedule is insufficient to ensure defendant's appearance or protection of victim or family member of victim of domestic violence.

4. Pen C §273.75 Background Check Considerations

- Information presented by prosecutor regarding defendant's prior convictions for domestic violence or other forms of violence or weapons offenses.
- Information presented by prosecutor regarding any current protective or restraining order on defendant issued by civil or criminal court.
- Safety of victim, victim's children, and any other person who may be in danger if defendant is released.

5. Other Considerations

- Mental condition of defendant. 1 California Criminal Defense Practice §12.05[5][c] (Matthew Bender, 2009).
- General health of defendant. 1 Cal Crim Defense Practice, *supra*.
- Defendant's military service history. 1 Cal Crim Defense Practice, *supra*.
- Defendant's use of alcohol or controlled substances during or preceding alleged offense.
- Pregnancy of alleged victim.
- Ongoing custody/visitation litigation.
- Threats of abduction of children.

- Attempts by alleged victim to leave or terminate relationship with defendant.

III. RELEASE ON OWN RECOGNIZANCE

A. Applicable Constitutional and Statutory Provisions

§2.7 1. Availability of Own Recognizance Release

The court may release a person on his or her own recognizance in the court's discretion. Cal Const art I, §12. A court or magistrate has discretion to release a defendant arrested for or charged with a noncapital offense on his or her own recognizance (OR), if the court could release the defendant on bail. Pen C §1270(a). Such OR release, however, is not a matter of right. See Cal Const art I, §12. OR release is prohibited in capital offense cases and in cases involving violent felonies, when it appears by clear and convincing evidence that the defendant has previously failed to appear in another felony case. Pen C §§1270(a), 1319(b).

Defendants in custody who are charged with misdemeanors are entitled to OR release in the absence of a finding by the court on the record that OR release will compromise public safety or will not reasonably assure the defendant's appearance as required. Pen C §1270(a). Public safety is the primary consideration in such misdemeanor OR releases. See Pen C §1270(a).

A defendant who is arrested for or charged with a nonviolent felony offense may be released on OR at the court's discretion. Cal Const art I, §12. Although there are no statutory guidelines as to what factors the court must consider in its decision to grant or deny an OR release to a defendant charged with a nonviolent felony, many courts apply the factors contained in Pen C §1275(a).

In determining the probability that the defendant will return to court if released on his or her own recognizance, the court must consider the defendant's ties to the community, the defendant's record of appearance at past hearings or of flight to avoid prosecution, and the severity of the possible sentence the defendant faces. *Van Atta v Scott* (1980) 27 C3d 424, 438, 166 CR 149. The defendant bears the burden of producing evidence of community ties, including employment or other sources of income, and the duration and location of the defendant's residence, property holdings, and family attachments. The prosecution bears the burden of producing evidence of the defendant's record of appearance at prior court hearings and the severity of the possible sentence. 27 C3d at 438. The prosecution also bears the burden of proof concerning the defendant's likelihood of appearing at future court hearings. 27 C3d at 444.

Persons released on OR are subject to later recommitment or reimposition of bail requirements if they fail to appear. See Pen C §§978.5(a)(3), 1318(a)(1). The court in which the charge is pending has discretion to revoke a defendant's OR release on proper review. *In re Annis* (2005) 127 CA4th 1190, 1198-1199, 26 CR3d 321.

§2.8 2. Investigation and Report

Penal Code §1318.1 authorizes the courts to employ staff to investigate defendants and recommend for or against OR release. Pen C §1318.1(a), (b). In all cases involving violent felonies as defined by Pen C §667.5(c), when the court has employed an investigative staff, the staff must prepare a report regarding whether the defendant should be granted OR release. The report must verify the following in writing (Pen C §1318.1(b)):

- The existence of any outstanding warrants against the defendant,
- Any prior incidents when the defendant failed to make a court appearance,
- The criminal record of the defendant, and
- Defendant's residence during the past year.

After the report is certified under Pen C §1318.1(b), it must be submitted to the court for review before an OR hearing under Pen C §1319. Pen C §1319(b). In addition, any investigative report prepared under Pen C §1318.1 must be placed in the court file for the case. Pen C §1319(c). The fact that the court has not received a report required by Pen C §1318.1 at the time of the OR hearing does not preclude OR release. Pen C §1319(b)(2). For further discussion of OR release hearing, see §2.9.

In addition, the prosecutor in domestic violence cases must investigate and present information regarding the defendant's prior convictions for domestic violence, other forms of violence or weapons offenses, and any current protective or restraining orders issued by a civil or criminal court for consideration by the trial court in releasing a defendant in custody on OR at arraignment. See Pen C §273.75(a).

§2.9 3. Own Recognizance Hearing

Persons charged with violent felonies as defined by Pen C §667.5(c), with serious felonies as defined by Pen C §1192.7(c), or with specified domestic violence offenses may not be released on their own recognizance without an open court hearing. Pen C §1270.1(a). This code section is consistent with Pen C §1319, which provides that before the court may order an OR release in a case in which the defendant is charged with a violent felony, a hearing must be held, with notice to the prosecutor and a reasonable opportunity to be heard on the matter. Similarly, Pen C §1319.5 requires a hearing before OR release for persons charged with a new offense, when the person is currently on felony probation or parole, or has previously failed to appear for certain specified offenses.

The court must give both the prosecutor and the defense attorney two court days' written notice and an opportunity to be heard on the matter at the OR hearing. If the defendant does not have an attorney, the court must appoint one for the purposes of the bail/OR hearing. Pen C §1270.1(b). The OR hearing must be held within the time period prescribed in Pen C §825. Pen C §1270.1(b); see Pen C §1319(a). Penal Code §825 generally requires that all defendants be taken before a magistrate without unnecessary delay, and in any event within 48 hours after their arrest, excluding Sundays and holidays. When a motion for OR release is made at the arraignment hearing required under Pen C §825, the court must exercise its discretion to grant or deny the motion even in the absence of the two court days' written notice. *Dant v Superior Court* (1998) 61 CA4th 380, 390, 71 CR2d 546 (arrest for cohabitant battery under Pen C §273.5). At the hearing, the court must consider evidence of past court appearances of the defendant, the maximum potential sentence that could be imposed, and the danger that may be posed to other persons if the defendant is released. In making the determination whether to grant OR release to defendants, the court must consider the potential danger to other persons, including threats that have been made by the detained person and any past acts of violence. The court also must consider any evidence offered by the defendant regarding his or her ties to the community and ability to post bond. Pen C §1270.1(c). In determining whether to grant OR release in violent felony cases under Pen C §1318.1, the court must consider the existence of any outstanding felony warrants, any information provided by the prosecuting attorney, and any other information from the Pen C §1318.1 investigative report, if one is prepared. Pen C §1319(b). In cases involving domestic violence, the court should also consider information presented by the prosecutor regarding the defendant's prior convictions for domestic violence, other forms of violence or weapons offenses, and any current protective or restraining orders issued by a civil or criminal court. See Pen C §273.75(a).

When considering OR release, courts generally look with favor on the fact that a defendant has maintained a regular residence for an extended period of time. In domestic violence cases, the court may want to weigh this fact differently, particularly because the defendant's return to the residence may give rise to additional violence. The court may want to request additional information from the OR investigator to adequately assess a domestic violence defendant's suitability for OR release. In addition, because of the frequency of re-assault in domestic violence cases and the need to protect victims, OR should be considered only after rejecting the options of (1) no release on bail, or (2) setting bail with a stay-away order.

§2.10 4. Conditions on Bail or Own Recognizance Release

In the case of a defendant arrested without a warrant for a bailable felony offense or for the misdemeanor offense of violating a domestic violence restraining order, Pen C §1269c authorizes a magistrate to set bail on terms and conditions that the magistrate deems appropriate. In addition, Pen C §1270 authorizes a court to set bail and to specify conditions after it makes the requisite findings that the defendant in custody and charged with a misdemeanor is not entitled to OR release. Pen C §1270(a). In contrast, Pen C §1275 does not explicitly grant the trial court authority to impose conditions on the granting of bail in cases covered by that statute. *Gray v Superior Court* (2005) 125 CA4th 629, 641-642, 23 CR3d 50.

Although the statutory authority for setting conditions on pretrial release is limited under Pen C §1275, there is a general understanding that trial courts possess inherent authority to impose conditions associated with release on bail. 125 CA4th at 642. For instance, the court of appeal has concluded that because public safety is the Legislature's overriding theme in the bail statutory framework, and because the trial court has inherent power to impose bail conditions, the trial court may impose bail conditions intended to ensure public safety. See *In re McSherry* (2003) 112 CA4th 856, 861-863, 5 CR3d 497 (modifying but allowing condition imposed during defendant's bail release pending appeal of conviction for loitering). However, bail conditions intended for public protection must be reasonable. *Gray v Superior Court, supra,* 125 CA4th at 642. For example, prohibiting a physician, charged with unlawfully prescribing and possessing a controlled substance and with sexually exploiting a patient or former patient (Bus & Prof C §729), from practicing medicine as a condition of bail release under Pen C §1275, although not per se unreasonable, is unreasonable under the circumstances, when the defendant voluntarily surrendered and was otherwise eligible for release on bail, and the Medical Board of California could have legitimately deprived the defendant of his medical license by other means. 125 CA4th at 641-644.

§2.11 5. Issuing Criminal Protective Orders in Own Recognizance Cases

Under Pen C §1318, a defendant seeking OR release may obtain it only after filing a signed release promising, among other things, to obey all reasonable conditions imposed by the court or magistrate. Pen C §1318(a)(2). Thus, a court or magistrate may impose reasonable conditions relating to public safety that extend beyond those intended to ensure subsequent court appearances as a prerequisite to releasing a felony defendant on OR. *In re York* (1995) 9 C4th 1133, 1139-1144, 40 CR2d 308; see Pen C §1318(a)(2). For instance, the California Supreme Court has upheld the requirement that defendants submit to random drug testing and permit warrantless search and seizure of their vehicles and persons as a reasonable condition to OR release when accused of possession of controlled substances. 9 C4th at 1141-1146. Penal Code §1318(a)(2) authorizes imposition of conditions that may implicate a defendant's constitutional rights, provided imposition of such conditions is reasonable under the circumstances. 9 C4th at 1146-1147; but see *U.S. v Scott* (9th Cir 2006) 450 F3d 863, 865-872 (warrantless drug testing imposed by Nevada state court as condition of pretrial release without bail requires showing of probable cause, although defendant executed prerelease consent; state failed to demonstrate it had special needs for imposing drug-testing release condition; and generalized need to protect community and blanket assertion that drug-testing is necessary to ensure defendant's appearance at trial are insufficient).

When OR is granted in domestic violence cases, criminal protective orders should be issued whenever it is shown that there is good cause to believe that harm, intimidation, or dissuasion of a victim or witness has occurred or is reasonably likely to occur. See Pen C §136.2(a). An order under Pen C §136.2 may restrict a defendant's access to the family residence and may bar communication by defendant or defendant's agent with the victim, except through an attorney, or under such reasonable restrictions as the court may impose. See Pen C §§136.2(a)(4), 136.3. Criminal protective orders may be issued either as a condition of OR, under Pen C §1275 or §1318(a)(2), or as an independent order under Pen C §136.2.

Penal Code §136.2 requires that the court consider issuing protective orders on its own motion in every domestic violence case, as defined by Pen C §13700. Pen C §136.2(e)(1). Additionally, if the court does not issue an order protecting the victim of a violent crime in a case in which the defendant is charged with domestic violence as defined by Pen C §13700, the court, on its own motion, must consider issuing a protective order if there is good cause to believe that harm to, intimidation of, or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Pen C §136.2(a)(7)(B)(i). For further discussion of protective orders under Pen C §136.2, see §§3.1 et seq.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/2 Pretrial Release/ §2.12 B. Checklist: Own-Recognizance Release for Domestic Violence Offenders

§2.12 B. Checklist: Own-Recognizance Release for Domestic Violence Offenders

1. Preliminary Considerations

(a) Felonies

- Noncapital, bailable offense—OR available in court's discretion. Pen C §1270(a); see Cal Const art I, §12.
- Capital offense or offense for which bail is unavailable—OR not available. Pen C §1270(a).
- Violent felony under Pen C §667.5(c), and defendant has previously failed to appear in another felony charge—OR not available. Pen C §1319(b).
- Serious felony under Pen C §1192.7(c), or violent felony under Pen C §667.5(c)—OR not available without prerelease OR hearing. Pen C §§1270.1(a)(1), 1319(a).
- Felony violation of Pen C §136.1 (intimidation of victim or witness), §262 (spousal rape), §273.5 (corporal injury), §422 (criminal threats), or §646.9 (stalking)—OR not available without prerelease OR hearing. Pen C §1270.1(a)(2)-(3).

(b) Misdemeanors

- Defendant in custody arraigned on complaint alleging misdemeanor offense—OR release required absent court finding on record that OR will compromise public safety or will not reasonably ensure defendant's appearance. Pen C §1270(a).
- Misdemeanor violation of Pen C §273.5 (corporal injury), §243(e)(1) (domestic violence battery), §273.6 (intentional or knowing violation of protective order, where defendant threatened to kill or harm, engaged in violence against, or went to residence or workplace of protected party), or §646.9 (stalking)—OR not available without prerelease hearing. Pen C §1270.1(a)(2)-(4).

(c) All cases

- Safety of the victim and the victim's family must be considered by the court in making its determination whether to grant OR. Cal Const art I, §28(b)(3), (f)(3).

2. Considerations in Cases Involving Violent and Serious Felonies, and Specified Domestic Violence Offenses (Pen C §1270.1(a), (c))

- Evidence of past court appearances of defendant.
- Maximum potential sentence that could be imposed.
- Danger that may be posed to other persons if defendant is released.
- Potential danger to other persons.
- Threats made by defendant.
- Any past acts of violence by defendant.
- Evidence of defendant's ties to community.
- Defendant's ability to post bond.

3. Considerations in Cases Involving Violent Felonies (Pen C §1319(b))

- Existence of any outstanding felony warrants on defendant.
- Any other information presented in investigative report prepared under Pen C §1318.1.
- Any other information presented by prosecutor.

4. Considerations in Cases Involving Domestic Violence (Pen C §273.75(a); see Pen C §13700(a), (b); Fam C §§6203, 6211)

- Prosecutor's information regarding defendant's prior convictions for domestic violence or other forms of

violence or weapons offenses.

- Prosecutor's information regarding any current protective or restraining order restraining defendant issued by civil or criminal court.

5. Conditions on OR Release, Including Criminal Protective Orders

- Court or magistrate may impose reasonable conditions on defendant as prerequisite to granting OR release. Pen C §1318(a)(2); *In re York* (1995) 9 C4th 1133, 1141, 40 CR2d 308.
- In imposing OR conditions, court or magistrate may weigh considerations relating to public safety extending beyond those intended to ensure defendant's subsequent court appearances. *In re York, supra,* 9 C4th at 1144; see Pen C §§1270, 1275.
- Court or magistrate may impose conditions that may implicate defendant's constitutional rights, provided imposing such conditions is reasonable under the circumstances. 9 C4th at 1146-1147; see Pen C §1318(a)(2).
- Criminal protective order may issue on good cause belief that harm to, intimidation of, or dissuasion of, victim or witness by defendant has occurred, or is reasonably likely to occur. Pen C §136.2(a).
- Conditions related to risk of flight. See *Van Atta v Scott* (1980) 27 C3d 424, 438, 166 CR 149.

3

Criminal Protective Orders

§3.1 I. ISSUANCE OF CRIMINAL PROTECTIVE ORDERS

The court must consider issuing a criminal protective order on its own motion in every case where the defendant is charged with a crime of domestic violence. Pen C §136.2(a)(7)(B)(i), (e). Criminal protective orders in domestic violence cases are generally characterized as "no contact" or "stay-away" orders. These orders may also provide "peaceful contact" between parties for the purpose of facilitating visitation. Peaceful contact orders allow defendant to make contact with the protected person(s) only for the safe exchange of children for court-ordered visitation as directed in prior or subsequent family, juvenile, or probate court orders. All protective orders issued in domestic violence cases must prohibit the defendant from possessing, purchasing, receiving, or attempting to purchase or receive firearms. In addition, the defendant must relinquish any firearms he owns or possesses. Pen C §136.2(a)(7)(B)(i), (d).

§3.2 A. Statutory Authority

On a good cause belief that harm to, intimidation of, or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue criminal protective orders under Pen C §136.2. Such orders may include, but are not limited to, the following (Pen C §136.2(a)(1)-(7)):

(1) An ex parte order enjoining contact between the defendant and the victim under Fam C §6320. In any case in which a defendant is charged with a crime of domestic violence, as defined in Pen C §13700, the court may consider, in determining whether there is good cause to issue the ex parte order, the underlying nature of the charged offense and information provided to the court under Pen C §273.75 (criminal history search). Pen C §136.2(h).

(2) An order that the defendant not intimidate victims or witnesses in violation of Pen C §136.1.

(3) An order that a person before the court other than the defendant, including subpoenaed witnesses or other persons entering the courtroom, not violate Pen C §136.1.

(4) An order that the defendant or other persons described in Pen C §136.2 have no communication with the victim or witness, except through an attorney under reasonable restrictions imposed by the court.

(5) An order calling for a hearing to determine if an order as described in items (1) to (4), above, should be issued.

(6) An order that a law enforcement agency within the court's jurisdiction provide protection for a victim, witness, or both, or for immediate family members of a victim or a witness residing in the same household as the victim or witness, or within reasonable proximity of the victim's or witness's household, as determined by the court.

(7) An order protecting victims of violent crime from all contact by the defendant, or from contact by the defendant with the intent to annoy, harass, threaten, or commit acts of violence.

Additionally, a court issuing an order under Pen C §136.2 must prohibit the enjoined party from taking any action to obtain the address or location of the protected party, or of a protected party's family members, caretakers, or guardians, unless there is good cause not to make such an order. See Pen C §136.3(a). On request by a victim, the judge also may include a provision permitting the victim to record any prohibited communication made to him or her by the perpetrator. Pen C §633.6(a).

If a court does not issue a protective order in a case where the defendant is charged with a crime of domestic violence, the court on its own motion must consider issuing a protective order prohibiting the defendant from owning, possessing, purchasing, receiving, or attempting to purchase or receive firearms, when there is a good cause belief that harm to, intimidation of, or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Pen C §136.2(a)(7)(B)(i). For discussion of firearm restrictions, see §3.6.

The court is required to consider issuing a protective order on its own motion in all cases in which the defendant is charged with a crime of domestic violence, as defined in Pen C §13700. Pen C §136.2(e)(1); see §3.1. To facilitate this, the same subdivision requires that the court's records of all criminal cases involving domestic violence be marked to clearly alert the court to this issue. This marking is important because domestic violence cases may be charged as trespassing, arson, disturbing the peace, harassing phone calls, etc., and not only under Pen C §243(e), §273.5, or §646.9. The court should coordinate with the court administrator's office in developing an effective method for marking cases involving domestic violence.

Judicial Tip: One court has devised a system comprised of a markup sheet placed on the outside of case files. The sheet provides a space to check off whether the case involves domestic violence. There are also spaces to indicate whether a protective order has been issued, and spaces to provide the duration of the order and dates that the order is issued, modified, or terminated.

The Judicial Council has promulgated mandatory forms for use in issuing orders under Pen C §136.2 in domestic violence and other types of cases. See Judicial Council forms CR-160 through CR-165. All interested parties must receive a copy of those orders. Pen C §136.2(e)(1).

§3.3 B. Evidence of Good Cause

There must be evidence in the record to support a trial court's finding of good cause for issuing an order under Pen C §136.2. See *People v Stone* (2004) 123 CA4th 153, 160, 19 CR3d 771 (reversal of Pen C §136.2 order required in absence of evidence in record to support trial court's finding of good cause for issuance); *People v Ponce* (2009) 173 CA4th 378, 383, 92 CR3d 667. To issue a restraining order under Pen C §136.2, the issuing court must have a "good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur." Pen C §136.2(a).

Only wrongdoing aimed at a victim or witness justifies issuing a restraining order under Pen C §136.2. The purpose of restraining orders authorized by Pen C §136.2 is to preserve the integrity of the administration of criminal court proceedings and protect those involved in them. It follows that the required good cause must show a threat, or a likely threat to the criminal proceedings or to participation in them. *People v Stone, supra,* 123 CA4th at 160. For example, a defendant's attacks on two victims before institution of criminal proceedings, before either became a witness in such proceedings, and without intent to interfere with such proceedings, did not present a direct threat to administration of the criminal proceeding or to the victims' participation in it, and thus are insufficient to justify issuance of a restraining order under Pen C §136.2. 123 CA4th at 160-161.

§3.4 C. Duration of Order

Penal Code §136.2 does not expressly provide time limitations on the duration of protective orders, However, the statute is construed as limiting orders to the pendency of the criminal action in which they are issued or to probation conditions. *People v Ponce* (2009) 173 CA4th 378, 382-383, 92 CR3d 667; *People v Selga* (2008) 162 CA4th 113, 118-119, 75 CR3d 453; *People v Stone* (2004) 123 CA4th 153, 159, 19 CR3d 771. Thus, the order should state that it remains in effect until the defendant is no longer subject to the court's jurisdiction, including any period of incarceration or probation.

Judicial Council form CR-165 must be used to terminate a protective order. This will insure that the termination will be entered into CLETS. A protective order must be terminated when a case is dismissed, when the defendant receives a nonprobationary sentence, or, if the defendant receives probation, when probation is revoked or expires.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.5 D. Modification of Order

§3.5 D. Modification of Order

Victims and even defendants frequently request the court to modify a criminal court protective order issued as a complete stay away, asking the court to permit peaceful contact instead. These modification requests are often made early in the criminal proceedings, including immediately after the arraignment when the original stay-away order has been issued. When the request is made postsentencing, the prosecutor must be given an opportunity to respond to these requests. Penal Code §1203.3 provides that before any sentence or term of probation is modified, a hearing shall be held in open court, and the prosecutor must be given an opportunity to be heard. Ordinarily, two days' notice to the prosecutor is required. However, Pen C §1203.3(b)(1) requires a full five days' notice to the prosecutor if the request is to modify or terminate a protective order issued in a case involving domestic violence. Even at the pretrial stage, the prosecutor should be involved before a protective order is modified or terminated.

In some counties, the prosecutor may not even be present at the arraignment, appearing instead at later proceedings, such as the pretrial hearing. However, it is imperative in domestic violence cases that a prosecutor be present in court from the outset of the case. Crucial decisions regarding issues such as the protective order may have a great impact on both the defendant and the victim. Furthermore, the prosecutor has an affirmative obligation under Pen C §273.75 to conduct a background check on the defendant and to report the results to the court. The prosecutor must search all relevant electronic data bases for any evidence of the defendant's criminal history including, but not limited to, any prior crimes involving domestic violence, other types of violent conduct or weapons offenses, and any current or prior restraining or protective orders issued by any criminal or civil court.

If the prosecutor is not in court to respond to a modification or termination request, the court is left to decide whether to grant the request based on what is often limited information. When the request is made early in the proceedings, it is typically the victim who appears in court to ask for the modification. The court should be aware of the possibility that the victim is operating under coercion or threats, particularly if he or she is accompanied by the defendant's family or friends. Addressing the victim from the bench forces the victim to respond in open court, and his or her answers may be guarded. If at all possible, someone other than the judicial officer, such as the prosecutor or a victim's advocate, should inquire privately about the request in an effort to determine what is motivating it.

In deciding whether to grant the request to modify the protective order so as to permit peaceful contact, the court should consider the following issues, keeping in mind that not all of these matters should be discussed in open court:

- *Victim's identity.* The court should require that satisfactory evidence of the victim's identity be provided, such as a driver's license or identification card.
- *The reason for the request.* Sometimes victims misunderstand the terms of a criminal court protective order. They may believe that the order prohibits any contact between the defendant and his or her children, for example, even though the order is actually made subject to a future order of the Family Law Court. The court can explain that the defendant does, in fact, have a lawful way to request visitation with the children. Victims also sometimes believe that their own conduct is constrained in some way. Asking why the victim wants the court to remove the protection at this time sometimes reveals a misunderstanding that, once resolved, allows the victim to be comfortable with the order as it stands.
- *Threats or coercion.* Someone—preferably not the court—should ask the victim if he or she has been pressured or threatened by the defendant or the defendant's family members or friends to make the request to modify the court order. Obviously, if this line of questioning occurs in open court in front of the defendant and his or her family or friends, the victim may be reluctant to answer in the affirmative.
- *Victim participation in support groups.* The victim should be made aware of local domestic violence support groups and should be encouraged to participate.
- *Development of a safety plan.* A safety plan is a comprehensive set of safety measures that a person in a battering relationship can take to enhance his or her future safety. An excellent resource is The Domestic Violence Victim's Handbook, *It Shouldn't Hurt to Go Home*, published by the County of Los Angeles Community and Senior Services Domestic Violence Unit in Los Angeles. These free handbooks, or similar materials, should

be readily available to victims seeking to modify a protective order. The court should not inquire in open court about the victim's safety plan because doing so can further jeopardize the individual. Ideally, a victim's advocate or the prosecutor should discuss the need for a safety plan of action with the victim.

- *Defendant's participation in a batterer's intervention program.* The court should determine whether the defendant has begun participating in a batterer's intervention program on a pretrial basis. If the defendant is already on probation and is required to participate in the program, the court should review the file to determine whether he or she is in fact attending the program. If the case is so new that the defendant's progress cannot be determined, the court can encourage the victim to consider leaving the order in place at least until it can be determined that the defendant is complying with the terms of probation.
- *Consider the impact on children if renewed contact is allowed.* Although the victim might want to renew contact with the children, the court should consider the impact on the children who are in the home, particularly if they witnessed or were involved in the violence. Furthermore, if the family has an open case with Children and Family Services (CFS), that agency will sometimes remove the children from the home if the criminal court protective order is modified to permit contact.

The setting in which these questions are asked can have a powerful impact on whether the victim answers candidly. Courts approach this need for honest information in a variety of ways. For example, a court might request a waiver of the defendant's appearance and then interview the victim in chambers with the proceedings reported but ordered sealed. Alternatively, a court might request the probation officer to conduct the interview. If a domestic violence counselor is available, the court might use his or her services for this purpose, which is particularly helpful because a certified domestic violence counselor can assert a privilege on behalf of the victim so that information provided by the victim can remain confidential in most circumstances. Finally, the court might simply ask these questions of the victim in open court. Although it is true this last approach is the most expedient, it may be the least reliable if the defendant is present in court to hear the victim's responses.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.6 E. Firearm Restrictions

§3.6 E. Firearm Restrictions

A defendant subject to a Pen C §136.2 protective order may not own, possess, purchase, receive, or attempt to purchase or receive a firearm while the order is in effect. Pen C §§136.2(d)(1), 12021(g)(3). After issuing the protective order, the court must order the defendant to relinquish any firearms in his or her immediate possession or control, or subject to the defendant's immediate possession or control, within 24 hours of being served with the order, either by surrendering the firearm to local law enforcement or selling the firearm to a licensed gun dealer. CCP §527.9(b); Pen C §136.2(d)(2). A defendant ordered to relinquish a firearm must file with the court a receipt of sale or surrender to the court within 48 hours after receiving the order. CCP §527.9(b). The court may grant an exemption from the relinquishment requirement under limited circumstances, *e.g.*, when a firearm is necessary as a condition of employment. See CCP §527.9(f).

Effective July 1, 2010, Cal Rules of Ct 4.700 requires a court, on issuing a criminal protective order under Pen C §136.2 during a criminal case or as a condition of probation under Pen C §1203.097(a)(2) (see §6.13) against a defendant charged with a crime of domestic violence as defined in Pen C §13700, to determine if there is good cause to believe that the defendant has a firearm within his or her immediate possession or control. Cal Rules of Ct 4.700(a), (c)(1). The court must consider all credible information, including information provided on behalf of the defendant, in making this determination. Cal Rules of Ct 4.700(c)(1). If the court finds good cause to believe that the defendant possesses or controls a firearm, it must set a review hearing to determine whether the defendant has relinquished the firearm as specified in CCP §527.9. Cal Rules of Ct 4.700(c)(2). If the defendant is not in custody at the time the criminal protective order is issued, the review hearing should take place within two court days after the order is issued. If circumstances warrant, however, the court may extend the review hearing up to 5 court days after the order is issued. Cal Rules of Ct 4.700(c)(2). If the defendant is in custody at the time that the order is issued, the court should order the defendant to appear for a review hearing within two court days after the defendant's release from custody. Cal Rules of Ct 4.700(c)(2).

If the proceeding is held under Pen C §136.2, the court may, under Pen C §977(a)(2), order the defendant to personally appear at the review hearing. If the proceeding is held under Pen C §1203.097, the court should order the defendant to personally appear. Cal Rules of Ct 4.700(c)(3).

At the review hearing, the burden of proof is on the prosecution. Cal Rules of Ct 4.700(d)(3). The court must give the defendant an opportunity to present evidence to refute the allegation that he or she owns any firearms. Cal Rules of Ct 4.700(c)(2).

If the court has issued a criminal protective order under Pen C §136.2, and the court finds at the review hearing that the defendant has a firearm in or subject to his or her immediate possession or control, the court must consider whether bail, as set, or defendant's own-recognizance release is appropriate. Cal Rules of Ct 4.700(d)(1)(A). If the defendant does not appear at the hearing and the court orders that bail be revoked, the court should issue a bench warrant. Cal Rule of Ct 4.700(d)(1)(B).

If the court has issued a criminal protective order under Pen C §1203.097, and the court finds at the review hearing that the defendant has a firearm in or subject to his or her immediate possession or control, the court must proceed under Pen C §1203.097(a)(12).

Federal firearms law. Federal law prohibits any person subject to a qualifying court order to transport, receive, or possess any firearm or ammunition in or affecting commerce. 18 USC §922(g)(8). A qualifying court order is an order:

- Issued after notice and hearing giving the restrained party an opportunity to be heard;
- Prohibiting harassing, stalking, or threatening an intimate partner or child of the partner or restrained party, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child;
- Finding that the restrained party represents a credible threat to the physical safety of such intimate party or child, or by its terms explicitly prohibits the use, attempted use, or threatened use of force against the partner or child that would reasonably be expected to cause bodily injury. 18 USC §922(g)(8)(A)-(C).

Note: An intimate partner is a spouse or former spouse, co-parent, or a cohabitant or former cohabitant. 18 USC §921(a)(32).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.7 F. Peaceful Contact Orders

§3.7 F. Peaceful Contact Orders

The court may issue a Pen C §136.2 criminal protective order that allows the defendant to have peaceful contact with the protected person(s) only for the safe exchange of children for court-ordered visitation as stated in an existing family, juvenile, or probate court order. A protective order may also provide that should a family, juvenile, or probate court grant visitation to a defendant under an order issued after the date the criminal protective order is signed, the defendant may initiate a peaceful contact with the protected person(s) to exercise his or her visitation rights without violating the order. See Pen C §136.2(e)(3), (f); Cal Rules of Ct 5.450. The peaceful contact provisions are located in boxes 13 and 14 of the Judicial Council form CR-160.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.8 G. Coordination of Domestic Violence and Other Orders

§3.8 G. Coordination of Domestic Violence and Other Orders

Local courts must establish a protocol to provide for timely coordination of all orders against the same defendant and in favor of the same named victim or victims. Pen C §136.2(f). The protocol must include mechanisms for assuring appropriate communication and information sharing between criminal, family, and juvenile courts regarding orders and cases involving the same parties. Pen C §136.2(f). It also must permit family or juvenile court orders to coexist with a criminal court protective order. Pen C §136.2(f). The safety of all parties must be the courts' paramount concern. Pen C §136.2(f)(2). California Rules of Ct 5.450, adopted in response to Pen C §136.2(f), requires local courts to adopt rules to (1) enhance communication among courts issuing criminal protective orders and orders involving child custody and visitation orders, including requirements to make reasonable efforts to determine whether there are orders in other courts that involve a party to the action, (2) modify protective orders to allow or restrict contact between the person restrained by the order and his or her children when another court has issued a subsequent child custody or visitation order, and (3) follow the requirements of Pen C §136.2(f). Cal Rules of Ct 5.450(c).

Under Pen C §136.2(f), family or juvenile court orders may coexist with a criminal protective order subject to the following (Pen C §136.2(f)):

- Any order that permits contact between the restrained person and his or her children shall provide for the safe exchange of the children and shall not contain language either printed or handwritten that violates a "no contact order" issued by a criminal court.
- Safety of all parties shall be the courts' paramount concern. The family or juvenile court shall specify the time, day, place, and manner of transfer of the child.

See *In re B. S.* (2009) 172 CA4th 183, 190-193, 90 CR3d 810 (juvenile court has authority to issue a restraining order in a dependency proceeding even though a criminal court has previously issued a similar order). In addition, each California county has been required to develop a procedure for electronically transmitting data on the issuance, modification, extension, or termination of restraining orders in domestic violence cases to the Department of Justice for input into the Domestic Violence Restraining Order System (DVROS), a statewide database of persons subject to criminal and other restraining orders, through the California Law Enforcement Telecommunications System (CLETS). See Fam C §6380. The data is transmitted into CLETS by a local law enforcement agency, or with permission of the Department of Justice court personnel. Fam C §6380(a).

Through computer access, DVROS makes all information pertaining to protective orders available to court personnel and law enforcement, whether the orders have been served on the defendant or respondent. Penal Code §136.2 orders are specifically included, together with other types of protective and restraining orders. Fam C §6380(b). When the court issues, modifies, extends, or terminates an order protecting victims of violent crime from all contact by the defendant, or from contact by the defendant with the intent to annoy, harass, threaten, or commit acts of violence under Pen C §136.2(a)(7), the court or a designee must transmit such orders to law enforcement personnel for input into DVROS within one business day of issuance, modification, extension, or termination. Pen C §136.2(a)(7)(A); Fam C §6380(a).

Court and law enforcement personnel are required to cooperate in transmitting protective order information to DVROS immediately on issuance of a protective order. See Fam C §6380(b). The transmitted information includes names of the protected persons, name and physical description of the person restrained, the date the order was issued, the terms and conditions of the order, the duration and expiration date, the department or division number of the court issuing the order, and whether the defendant or respondent has been served. Fam C §6380(b). DVROS must also be notified by court personnel or law enforcement when service of an order on a respondent or defendant has been made. See Fam C §6380(d)(1).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.9 H. Issuance of Orders Protecting Children

§3.9 H. Issuance of Orders Protecting Children

Domestic violence cases often involve children as direct or indirect victims of abuse. See Welf & I C §18290. Courts may be asked to issue criminal protective orders to protect children who are not directly threatened with harm by the defendant. See Pen C §136.2(a)(6) (order directing local law enforcement to provide protection for victim's children). Defendants in domestic violence cases often threaten to abduct children, follow through with such threats, fight protracted custody battles, and otherwise use children to attempt to dissuade victims from following through with the legal process. Although there is no express authority for issuing custody or visitation orders under Pen C §136.1 or §136.2, Pen C §136.1(c)(1) does prohibit the defendant from knowingly and maliciously preventing, dissuading, or attempting to prevent or dissuade a witness from attending or testifying by using express or implied threats of force on any third person or on the property of any victim, witness, or any third person.

Children of the victim are included in the definition of "immediate family members" in Pen C §136.2(a)(6), which authorizes judges to order law enforcement agencies within their jurisdiction to provide protection for victims and immediate family members. Thus, when an alleged batterer threatens to use force on the children of a victim to dissuade the victim from testifying, an order under Pen C §136.2 can be drafted to protect the children. For example, in *People v Ford* (1983) 145 CA3d 985, 193 CR 684, the defendant said to a witness after the preliminary hearing, "we'll get you; you've got kids." The appellate court held that this could have been interpreted as an attempt to prevent a witness from testifying in the future, not just as retaliation for past testimony. 145 CA3d at 989.

Less clear is a situation in which the defendant allegedly threatens to take the children by removing them from the family home. There may be no custody order granting sole physical custody to either parent. When it is clear that the threat to take the children is to dissuade the victim from testifying, a violation of Pen C §136.1 may be demonstrated. To obtain an order under Pen C §136.2, preventing the defendant from removing the children from the physical custody of the victim, facts must be presented to support a good cause belief that the defendant's action has harmed, intimidated, or dissuaded a victim or witness or is reasonably likely to do so. See Pen C §136.2(a). The required good cause must show a threat, or a likely threat, to the criminal proceedings or to participation in them. *People v Stone* (2004) 123 CA4th 153, 160, 19 CR3d 771.

If the purpose for removing the children is not clearly to dissuade a witness from testifying, the general rule is that both the defendant and victim have equal right to the children's custody when they are co-parents. Penal Code §278.5 makes it a crime for one parent to take a child from the other parent if the taking maliciously deprives the other parent of lawful custody or of a right to visitation. Penal Code §278.5(a). A custody order obtained after the taking does not constitute a defense. Pen C §278.5(c). However, Pen C §278.7 provides an exception and affirmative defense to this statute for a person with a right to custody of a child who takes, entices away, keeps, withholds, or conceals a child with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm. Pen C §278.7(a); *People v Neidinger* (2006) 40 C4th 67, 75, 76, 79, 51 CR3d 45 (defendant need only raise reasonable doubt regarding facts underlying Pen C §278.7(a) defense). In this context, "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. Pen C §278.7(b).

In that situation, the parent who takes, entices away, keeps, withholds, or conceals the child must, within a reasonable time, file a report with the district attorney of the county in which the child resided at the time of the taking, and must commence a custody proceeding in a court of competent jurisdiction. Pen C §278.7(c)(1), (2). In addition, the person who takes, entices away, keeps, withholds, or conceals the child must keep the district attorney informed of any subsequent address or telephone change for that person and for the child. Pen C §278.7(c)(3). A "reasonable time" within which to make a report to the district attorney is defined as at least 10 days; a reasonable time within which to "commence a custody proceeding" is defined as at least 30 days. Pen C §278.7(d). Note that these time frames are minimums, not maximums or deadlines. However, a defendant is not entitled to a Pen C §278.7 defense if he or she fails to report the taking as required by the statute and fails to commence a custody proceeding in a court of competent jurisdiction. *People v Mehaisin* (2002) 101 CA4th 958, 965, 124 CR2d 683.

§3.10 1. When a Civil Order Regarding Children Exists

In some domestic violence criminal cases, there are civil orders already in effect regarding custody and visitation of the couple's children that prohibit contact between the parties and exclude the defendant from the victim's residence. In these cases, criminal court judges should still consider issuing protective orders under Pen C §136.2. This will show that both courts are sending the same message that domestic violence is wrong and that the defendant may not play one court against the other.

Additionally, because the protective order is in effect as long as the criminal case is pending, including periods of local custody, it may outlast the civil order by many years. Moreover, issuance of a protective order gives the criminal court more direct control over the defendant's actions. The contempt hearing for violating the criminal court protective order will usually be before the same judge who issued the order. In contrast, the Pen C §273.6 trial for violating a civil restraining order may well be before another judge.

The criminal court judge may issue a peaceful contact order that allows the defendant to make peaceful contact with the victim only for the safe exchange of children consistent with any existing family, juvenile, or probate order. See §3.7.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.11 2. Conflicts Between Civil Order and Criminal Protective Order

§3.11 2. Conflicts Between Civil Order and Criminal Protective Order

Sometimes a civil restraining order is in effect that allows the defendant to contact the victim in a manner that is prohibited by a criminal protective order. For example, the family or juvenile court order may allow the defendant to contact the victim by telephone, or to see the victim in the course of picking up and dropping off children during visitation. The criminal stay-away order may prohibit such conduct. A conflict thus may arise over which order controls. The general rule is that the more restrictive order should apply.

Penal Code §136.2 provides that a domestic violence protective order issued by the criminal court generally takes precedence in enforcement over any other civil court order. See Pen C §136.2(c)(1), (e)(2). Specifically, in those cases in which a complaint, information, or indictment charging a domestic violence crime as defined in Pen C §13700 has been issued, a restraining order or protective order against the defendant issued by the criminal court in that case has precedence in enforcement over any civil court order against the defendant. Pen C §136.2(e)(2). However, if the civil court has issued an emergency protective order under Fam C §§6250 et seq or under Pen C §646.91 (stalking), the emergency protective order takes precedence in enforcement if (Pen C §136.2(c)(1), (e)(2)(A)-(C)):

(1) The emergency protective order is issued to protect one or more individuals who are already protected persons under another restraining or protective order;

(2) The emergency protective order restrains the individual who is the restrained person in the other restraining or protective order; and

(3) The provisions of the emergency protective order are more restrictive in relation to the restrained person than those of the other restraining or protective order.

Moreover, emergency protective orders meeting the above requirements have precedence in enforcement over the provisions of any other restraining or protective order *only* with respect to those provisions of the emergency protective order that are more restrictive in relation to the restrained person. Pen C §136.2(c)(2) (emphasis added).

Family Code §3031 suggests that civil courts issuing custody orders attempt to coordinate those orders with any existing restraining orders. Indeed, the courts are encouraged not to make a custody or visitation order that is inconsistent with an emergency protective order, protective order, or other restraining order, unless the court makes the following findings (Fam C §3031(a)):

(1) The custody or visitation order cannot be made consistent with the emergency protective order, protective order, or other restraining order; and

(2) The custody or visitation order is in the best interest of the minor.

When custody or visitation is granted to a parent in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the custody or visitation order must specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members, and must prevent disclosure of the location of any shelter or other confidential location. Fam C §3031(b). Furthermore, the court must consider whether the best interest of the child requires that a custody or visitation arrangement be limited to situations when a third person is present, or whether custody or visitation should be suspended or denied. Fam C §3031(c).

Additionally, Cal Rules of Ct 3.300 imposes a duty on civil trial counsel to inform the court of other pending civil actions that are related to the case at trial. Both Fam C §3031 and Cal Rules of Ct 3.300 attempt to coordinate the responses of the courts when the same family is before different judges. Courts should work with court administrators to improve this coordination so that each judge is aware of other matters and orders involving the same parties. Protective orders that are entered into the Domestic Violence Restraining Order System (DVROS) should be available to the criminal court. See Fam C §6380(a) (providing for court responsibility for transmitting domestic violence orders into DVROS); for discussion of DVROS, see §3.8.

§3.12 I. Mutual Protective Orders

The issuance of mutual protective orders is not appropriate. First, the criminal court lacks jurisdiction over the victim, who is not party to the criminal action. Second, when mutual stay-away orders have been considered in civil cases, they have been held to require reversal, unless there is evidence of abuse by the victim toward the defendant, and notice to the victim that such an order is being considered. See, *e.g., FitzGerald v FitzGerald* (Minn App 1987) 406 NW2d 52. California cases addressing this issue have reversed mutual civil harassment restraining orders issued under CCP §527.6 based on the lack of a petition by the defendant and the fact that the plaintiff had no notice or opportunity to respond to specific charges. *Nora v Kaddo* (2004) 116 CA4th 1026, 1029, 10 CR3d 862; *Kobey v Morton* (1991) 228 CA3d 1055, 1059-1060, 278 CR 530.

Moreover, Fam C §6305 prohibits the issuance of mutual restraining orders in civil cases unless both parties personally appear and each presents written evidence of abuse or domestic violence. In addition, the court must make detailed findings of fact indicating that both parties acted primarily as aggressors and that neither acted primarily in self-defense. Fam C §6305; *Monterroso v Moran* (2006) 135 CA4th 732, 736, 37 CR3d 694. The parties may not waive these requirements. See Stats 1995, ch 246, §2 (eliminating former waiver provision from language of Fam C §6305); *Conness v Satram* (2004) 122 CA4th 197, 204, 18 CR3d 577 (noting statutory amendment eliminating waiver provision).

Although the Family Code does not control the issuance of mutual orders in criminal cases, the policy objectives in both types of domestic violence cases remain the same: communicating a clear message to the batterer that he or she may no longer abuse the victim, and crafting an order that is enforceable by law enforcement officers as well as by a contempt finding. The issuance of mutual protective orders in criminal domestic violence cases is not authorized by any statute and is strongly discouraged for policy reasons. As one California court of appeal has recognized, "an improvidently issued mutual restraining order may adversely impact victims of domestic violence and continue their victimization." See *Monterroso v Moran, supra*, 135 CA4th at 738 (civil case under Domestic Violence Prevention Act (Fam C §§6200 et seq)). Mutual restraining orders also can create difficult enforcement problems, because the police often do not know who to arrest if there is a subsequent altercation and may end up arresting both parties or neither party. *Monterroso v Moran, supra*.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.13 J. Enforcement Considerations

§3.13 J. Enforcement Considerations

When issuing a criminal protective order under Pen C §136.2, the court should advise the defendant that a violation of the order is punishable under Pen C §136.1 as a misdemeanor or felony. See §3.16. Additionally, the court should also advise the defendant that he or she may also be punished for contempt of court under Pen C §166(c). See §§3.17-3.18. And the court should inform the defendant that possession of a firearm while the order is in effect is a violation of state and federal laws. See §3.6. The Judicial Council has adopted forms CR-160 and CR-162 to be used by the court to issue criminal protective orders.

§3.14 1. Notice

All interested parties must receive a copy of orders issued under Pen C §136.2. See Pen C §136.2(e)(1). Thus, a copy of the stay-away order should be given to each of the following:

(1) *Defendant and defendant's attorney.* The court should explain the order to the defendant in case the defendant is unable to read English or fails to read or understand the form. An additional copy should be given to the defendant's attorney.

(2) *Prosecutor and victim or victims.* Because the protected party may not be present at the time the order is issued, the prosecutor can be asked to deliver and explain it to the victim. The victim should be told to call the police if the order is violated and to report violations to the prosecutor and/or probation officer.

(3) *Law enforcement.* Law enforcement agencies are required to maintain a record of all restraining orders sent to them in domestic violence cases, including stay-away orders issued under Pen C §136.2. See Pen C §13710(a)(1). These records are to be used to inform law enforcement officers responding to domestic violence calls of the existence, terms, and effective dates of protective orders in effect. Pen C §13710(a)(1). In addition, on request, law enforcement agencies must serve the order on the party to be restrained at the scene of a domestic violence incident or at any time the party is in custody. Pen C §13710(c). The court should consult with the court administrator to determine the most expeditious and reliable means for sending copies to local law enforcement agencies. This may be done by fax, electronic mail, a daily pickup box, or in other ways.

(4) *Domestic Violence Restraining Order System (DVROS).* A physical copy of a criminal court protective order issued under Pen C §136.2(a)(7) must be transmitted by the court or its designee within one business day to a local law enforcement agency authorized by the Department of Justice to enter orders into DVROS. Fam C §6380(a); see Pen C §136.2(a)(7)(A). Orders based on Pen C §136.2(a)(7) must be issued on Judicial Council forms approved by the Department of Justice under Fam C §6380(i), although a failure to use the required forms does not, of itself, make the order unenforceable. Pen C §136.2(a)(7)(C).

An out-of-state domestic violence protective or restraining order must be registered in a California court for the purpose of being entered in the DVROS when the person in possession of the order requests it. Fam C §6404(a). The Judicial Council is required to adopt rules of court to set forth the process by which a person in possession of a valid foreign protective order may voluntarily register the order with a California court for entry into the DVROS. Fam C §6404(a)(1); for further discussion of DVROS system, see §3.8. The Council is also required to adopt rules of court to require the sealing of foreign protective orders and to provide access only to law enforcement, the person who registered the order, the defense after arraignment on criminal charges involving an alleged violation of the order, or on further order of the court. Fam C §6404(a)(2).

Proof of service of the protective order is not required by Fam C §6380 if the order shows that both parties were present when the order was issued, or if the order was served by a law enforcement officer under Fam C §6383. Fam C §6385(a).

(5) *Court case file.* The original or a copy of the stay-away order should be kept in the court case file.

§3.15 2. Enforcement When Victim Contacts Defendant

If the victim initiates contact with the defendant during the pendency of a protective order, he or she cannot be held in contempt because the victim is not a party to the action or subject to the court's jurisdiction and order. The victim cannot violate an order issued for his or her protection.

Moreover, regardless of a victim's conduct, law enforcement must enforce protective orders. The terms of the orders remain enforceable notwithstanding the parties' acts, and can be changed only by order of the court. Pen C §13710(b). Courts issuing orders should advise defendants that only the court can change an existing order, and that victims cannot waive a court's order.

In *People v Gams* (1997) 52 CA4th 147, 153-155, 60 CR2d 423, defendant challenged Pen C §13710(b) as violating the due process requirements of fair notice because the complaining witness could enforce or not enforce the order at will. The court upheld the constitutionality of the statute, noting that it has "as [its] raison d'être the protection of victims from participation or complicity in their own predicament." 52 CA4th at 153-154. Penal Code §13710(b) provides a reasoned response to the psychosocial phenomenon of "learned helplessness," which occurs when a person is conditioned to believe that he or she cannot control what happens to him or her. That perception becomes reality, resulting in the person becoming passive, submissive, and "helpless." 52 CA4th at 154. The court further noted that there are statutory procedures under CCP §533 and Fam C §6345 for dissolving protective orders if subsequent behavior by the protected party casts doubt as to whether the protected party has had a change of heart before the order expires, thus protecting the due process rights of the parties and the integrity of the court's orders, and preventing parties from taking the law into their own hands. 52 CA4th at 154-155.

There are also other reasons that a victim of domestic violence might not enforce such an order. These include fear of increased violence if the victim does not comply with the defendant's demands.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/ II. VIOLATION OF PROTECTIVE ORDERS/§3.16 A. Punishment for Violation of Criminal Protective Order: Pen C §136.1

II. VIOLATION OF PROTECTIVE ORDERS

§3.16 A. Punishment for Violation of Criminal Protective Order: Pen C §136.1

Depending on the circumstances, violating a court order issued under Pen C §136.2 may be punished as a misdemeanor or as a felony offense. See Pen C §§136.2(b), 136.1(a), (c). Penal Code §136.1(a) makes it a misdemeanor for any person to knowingly and maliciously prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law, or to attempt to do so. Pen C §136.1(a)(1), (2). Violation of Pen C §136.1 may be treated as a felony when (Pen C §136.1(c)):

(1) The act of preventing or dissuading a victim or witness, or attempting to do so, is accompanied by force or by an express or implied threat of force on the witness, victim, or any third person, or on their property;

(2) The act is in furtherance of a conspiracy;

(3) The act is committed by a person who has been convicted of a prior violation of Pen C §136.1, a predecessor statute, or of a federal statute or statute in another state that would be a violation of Pen C §136.1; or

(4) The act is committed for pecuniary gain.

A person convicted of an offense under Pen C §136.1(c) is guilty of a felony punishable by imprisonment in state prison for two, three, or four years. Pen C §136.1(c).

A person who attempts to commit an act described in Pen C §136.1(a)-(c) is guilty of the offense attempted without regard to the success or failure of the attempt. The fact that no person was physically injured, or that no person was in fact intimidated, is not a defense. Pen C §136.1(d).

The crime of threatening a victim or witness, as proscribed by Pen C §136.1(c)(1), is a specific intent crime. *People v Young* (2005) 34 C4th 1149, 1211, 24 CR3d 112; *People v Brenner* (1992) 5 CA4th 335, 339, 7 CR2d 260; *People v Ford* (1983) 145 CA3d 985, 989, 193 CR 684. Similarly, attempting to dissuade a victim from testifying, as proscribed by Pen C §136.1(a)(1), is a specific intent crime. *People v Lyons* (1991) 235 CA3d 1456, 1460-1461, 1 CR2d 763. Third parties may also be held liable under Pen C §136.1(c)(2) and (4).

A Pen C §136.1 violation may be charged as a continuous course of conduct. In other words, the prosecutor is not required to elect and charge each incident as a separate offense. *People v Salvato* (1991) 234 CA3d 872, 883-884, 285 CR 837 (distinguishing Pen C §136.1 from Pen C §422 in this regard; violating Pen C §422 cannot be charged as continuous course of conduct). But see Pen C §166(b)(2), stating that for sentencing purposes under Pen C §166(b), when a restrained person is charged with contempt for willfully violating a court order under Pen C §166(a)(4) by contacting a victim directly, by phone, or by mail after having been previously convicted of stalking under Pen C §646.9, each contact constitutes a separate violation. Thus, when Pen C §166(b) applies to the facts involved, it appears that the choice of whether to treat a Pen C §136.1 violation as a continuous course of conduct rests with the prosecutor. For further discussion of contempt, see §§3.17-3.18.

B. Violation of Criminal Protective Order Punishable as Contempt: Pen C §166

§3.17 1. Statutory Law

A violation of Pen C §136.2 may be punished as a contempt of the court making the order. Pen C §136.2(b). A person who willfully disobeys the written terms of any lawful California or out-of-state court order, including orders pending trial, is guilty of misdemeanor contempt of court punishable by imprisonment in county jail for up to six months, or by a fine of up to $1000, or by both. See Pen C §§19, 166(a)(4).

A person who has a prior conviction for stalking under Pen C §646.9, and who violates Pen C §166(a)(4) by willfully contacting a victim directly or by telephone or mail, must be punished by up to a year in jail or a fine of $5000, or both. Pen C §166(b)(1). For sentencing purposes under Pen C §166(b), each contact is a separate violation. Pen C §166(b)(2). In addition, the present incarceration of a person who makes contact with the victim in violation of Pen C §166(b)(1) is not a defense. Pen C §166(b)(3).

Notwithstanding Pen C §166(a)(4), any willful and knowing violation of a protective or stay-away order issued under Pen C §136.2 in a pending criminal proceeding involving domestic violence as defined in Pen C §13700, or issued as a probation condition after conviction in a criminal proceeding involving domestic violence, or violation of other orders as described in Pen C §166(c)(3) is a misdemeanor contempt of court punishable by imprisonment in a county jail for up to one year, by a fine of up to $1000, or by both imprisonment and fine. Pen C §166(c)(1). A violation of Pen C §166(c)(1) resulting in physical injury requires that the person be imprisoned in county jail for at least 48 hours, regardless of whether a fine or imprisonment is imposed, or the sentence is suspended. Pen C §166(c)(2). A second or subsequent conviction for violating any order in Pen C §166(c)(1) within seven years of a prior conviction for violation of those orders that involves an act of violence or "a credible threat" of violence, as provided in Pen C §139(c) and (d), is punishable by imprisonment in a county jail for up to one year, or in state prison for 16 months or two or three years. Pen C §166(c)(4).

If probation is granted on conviction of a violation of Pen C §166(c), the court must impose probation consistent with the provisions of Pen C §1203.097. Pen C §166(e)(1); see §§6.26-6.27. Conditions of probation may include payment to a battered woman's shelter or restitution to the victim, or both, in lieu of a fine. See Pen C §166(e)(2).

§3.18 2. Case Law

To find a defendant in contempt for violating Pen C §166(a)(4), (c)(1), there must be proof that (*People v Greenfield* (1982) 134 CA3d Supp 1, 4, 184 CR 604):

(1) An order was lawfully issued,

(2) Defendant knew of the order,

(3) Defendant had the ability to obey the order, and

(4) Defendant willfully failed to obey the order.

Contempt is a general-intent crime. It is established by showing that the defendant intended to do the proscribed act without the additional requirement that the defendant intended to do some further act or achieve some additional consequence. 134 CA3d Supp at 4 (term "willful" does not connote specific intent).

There is a constitutional right to a jury trial in criminal contempt cases involving serious punishment. *Bloom v Illinois* (1968) 391 US 194, 198, 88 S Ct 1477, 20 L Ed 2d 522; *Mitchell v Superior Court* (1989) 49 C3d 1230, 1240, 265 CR 144; *In re Kreitman* (1995) 40 CA4th 750, 753, 47 CR2d 595. The actual penalty imposed is determinative of whether a criminal contempt is a serious offense. *Codispoti v Pennsylvania* (1974) 418 US 506, 516-517, 94 S Ct 2687, 41 L Ed 2d 912; *In re Kreitman, supra,* 40 CA4th at 755. Crimes carrying a sentence of more than six months must be treated as serious crimes. *Codispoti v Pennsylvania, supra,* 418 US at 512; *In re Kreitman, supra,* 40 CA4th at 755. Thus, when the defendant is faced with a possible aggregate sentence of more than 180 days on contempt charges, the court must either limit the sentence imposed to 180 days or must inform the defendant of his or her right to a jury trial. Absent an express waiver by the defendant of the right to a jury trial, the court must proceed with a jury. 40 CA4th at 755; see *People v Earley* (2004) 122 CA4th 542, 550-551, 18 CR3d 694 (reversing five six-month sentences imposed in postverdict contempt adjudication under Pen C §166 for acts allegedly committed by defendant during trial when court failed to afford defendant right to jury trial at contempt proceeding).

§3.19 C. Violation of Civil Protective Orders: Pen C §273.6

Under Pen C §273.6(a), an intentional and knowing violation of certain specified civil protective orders is punishable as a misdemeanor by a fine of up to $1000, or by imprisonment in county jail for up to one year, or by both that fine and imprisonment. However, Pen C §273.6(a) applies only to violations of civil protective orders as defined in Fam C §6218, to violation of an order issued under the Civil Harassment Prevention Act (CCP §527.6), to violation of an order issued under the Workplace Violence Safety Act (CCP §527.8), to a violation of an order issued under CCP §527.85 (injunctive relief against postsecondary school violence), or to violation of a protective order enjoining elder or dependent harassment or abuse under Welf & I C §15657.03. See Pen C §273.6(a). It therefore appears inapplicable to violation of criminal protective orders issued under Pen C §136.2. See §3.2. A subsequent conviction occurring within seven years of a prior conviction for violating an order described in Pen C §273.6(a) and involving an act of violence or a "credible threat" of violence as defined in Pen C §139(c) is a wobbler punishable by imprisonment in county jail or in state prison for up to one year. Pen C §273.6(d). A "credible threat" is defined as a threat made with the intent and apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or for the safety of his or her immediate family. Pen C §139(c).

A person who owns, possesses, purchases, or receives a firearm knowing that he or she is prohibited from doing so by the provisions of a protective order as defined in Pen C §136.2, Fam C §6218, CCP §527.6, §527.8, or §527.85, or Welf & I C §15657.03 must be punished under Pen C §12021(g). Pen C §273.6(g)(1); CCP §527.85(i).

If the court grants probation on conviction of a violation of Pen C §273.6(a), (c), or (d), the court must impose probation consistent with Pen C §1203.097. Such conditions may include, in lieu of a fine, the payment of up to $5000 to a battered women's shelter, or the reimbursement to the victim for costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense. Pen C §273.6(h); see §§6.26-6.27.

Orders to pay fines or restitution must be conditioned on the defendant's ability to pay. Orders to make payments to a battered women's shelter must not be made if it would impair the defendant's ability to pay direct restitution to the victim or to pay court-ordered child support. Pen C §273.6(i). In addition, when injury to a married person is caused in whole or part by the criminal acts of his or her spouse in violation of Pen C §273.6, separate property of the offending spouse must be exhausted before community property can be used for payment of restitution to the injured spouse. See Pen C §273.6(i).

§3.20 1. Punishment When Physical Injury Inflicted

When a violation of Pen C §273.6(a) results in physical injury, the offender must be punished by a fine of up to $2000, or by imprisonment in county jail for no less than 30 days nor more than one year, or by both that fine and imprisonment. Pen C §273.6(b). However, if the person is imprisoned in county jail for at least 48 hours, the court may, in the interest of justice and for reasons stated on the record, reduce or eliminate the 30-day minimum imprisonment. In determining whether to reduce or eliminate the minimum imprisonment, the court must consider (Pen C §273.6(b)):

(1) The seriousness of the facts before the court,

(2) Whether there are additional allegations of violations of the order during the pendency of the case before the court,

(3) The probability of future violations,

(4) The safety of the victim, and

(5) Whether the defendant has successfully completed or is making progress with counseling.

In the event of a subsequent conviction for violating an order described in Pen C §273.6(a) for an act occurring within one year of a prior conviction under Pen C §273.6(a) that results in physical injury to a victim, the person must be punished by a fine of up to $2000, or by imprisonment in county jail or in state prison for no less than six months nor more than one year, or by both that fine and imprisonment. Pen C §273.6(e). If the person is imprisoned in county jail for at least 30 days, however, the court may, in the interest of justice and for reasons stated in the record, reduce or eliminate the six-month minimum imprisonment required by Pen C §273.6(e). In determining whether to reduce or eliminate the minimum imprisonment required under Pen C §273.6(e), the court must consider the same factors to be considered under Pen C §273.6(b), as listed above. See Pen C §273.6(e).

If the court grants probation on conviction of a violation of Pen C §273.6(b) or (e), the court must impose probation consistent with Pen C §1203.097. Such conditions may include, in lieu of a fine, the payment of up to $5000 to a battered women's shelter, or the reimbursement to the victim for costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense. Pen C §273.6(h); see §§6.26-6.27.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.21 2. Other Court Orders

§3.21 2. Other Court Orders

Penal Code §273.6(a) and (b) expressly apply to the following court orders (Pen C §273.6(c)(1)-(4)):

- Any order issued under Fam C §6320 or §6389. These orders are quite broad, prohibiting the defendant from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, destroying personal property, contacting by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party or other family or household members, and prohibiting the defendant from owning or possessing a firearm while the order is in effect. The court may include in a Fam C §6320 protective order a grant to the petitioner of the exclusive care, possession, or control 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. The court may order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal. Fam C §6320(b).
- An order excluding one party from the family dwelling or from the dwelling of the other.
- An order enjoining a party from specified behavior that the court determined was necessary to effectuate the orders under Pen C §273.6(a).
- An order issued by another state that is recognized for registration in the Domestic Violence Restraining Order System (DVROS) under Fam C §§6400 et seq.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.22 D. Violation of Juvenile Court Protective Order: Pen C §273.65

§3.22 D. Violation of Juvenile Court Protective Order: Pen C §273.65

An intentional and knowing violation of a protective order issued by a juvenile court under Welf & I C §213.5, §304, or §362.4 is a misdemeanor punishable by a fine of up to $1000, or by imprisonment in county jail for up to one year, or by both the fine and imprisonment. Pen C §273.65(a). The court should use Judicial Council form JV-250 to issue juvenile court restraining orders related to domestic violence issued under Welf & I C §213.5, although a failure to use the approved form does not, in itself, make the order unenforceable. Welf & I C §213.5(i). Information on a juvenile court restraining order related to domestic violence must be transmitted to the Department of Justice under Fam C §6380(b). Welf & I C §213.5(j).

In addition, Welf & I C §726.5(a) authorizes juvenile courts to issue protective orders as provided in Pen C §213.5 or as defined in Fam C §6218 in delinquency cases. It is possible that such delinquency orders also come within the enforcement provisions of Pen C §273.65.

E. Double Jeopardy and Pen C §654 Issues

§3.23 1. Which Statute Should Be Used

In determining which statute, Pen C §166, §273.6, or §273.65, should be used when a civil restraining order or a criminal protective order has been violated, the basic rule is that when a specific statute covers a particular subject, it prevails over a general statute encompassing the same subject. See *In re Williamson* (1954) 43 C2d 651, 654, 276 P2d 593; *People v Jenkins* (1980) 28 C3d 494, 502, 170 CR 1. In addition, when the Legislature has enacted a specific statute addressing a specific matter, and has prescribed a sanction for its violation, the state may not prosecute under a general statute that covers the same conduct but prescribes a more severe penalty, unless a legislative intent to permit such alternative prosecution clearly appears. The state retains discretion to prosecute under a general statute that provides a sanction less severe than that called for under a specific statute. *Mitchell v Superior Court* (1989) 49 C3d 1230, 1250, 265 CR 144. The following Penal Code sections cover acts that constitute disobedience of court orders:

(1) Penal Code §166(a)(4) covers all lawful court orders;

(2) Penal Code §273.6 covers certain civil restraining orders issued in domestic violence cases;

(3) Penal Code §273.65 covers restraining orders issued by juvenile courts;

(4) Penal Code §166(c) covers criminal court protective orders issued under Pen C §136.2 in domestic violence cases.

Thus, if a defendant violates one of the special civil orders enumerated in Pen C §273.6, it is probably advisable to prosecute the case under Pen C §273.6, the more specific statute, and not under Pen C §166(a)(4), the more general law. Both provide the same misdemeanor penalties. Compare Pen C §273.6(a) and Pen C §166(a)(4). Similarly, because Pen C §166(c) specifically applies to disobedience of criminal court orders in cases involving domestic violence, "notwithstanding paragraph (4) of subdivision (a)," presumably this phrase means that Pen C §166(c) should apply rather than Pen C §166(a)(4) in all cases involving domestic violence orders issued by criminal courts

§3.24 2. When Only Criminal Protective Order Is in Effect

When only a criminal protective order is in effect under Pen C §136.2, and that order is violated, the defendant can be prosecuted for criminal contempt under Pen C §166(a)(4) or §166(c), and for the substantive violation of the order under Pen C §136.1. See Pen C §136.2(b). A finding of contempt is not a bar to prosecution for a violation of Pen C §136.1. However, a conviction or acquittal for any substantive offense under Pen C §136.1 bars subsequent punishment for contempt arising out of the same act. Pen C §136.2(b). In addition, any person held in contempt under Pen C §136.2 is entitled to credit for any punishment imposed against any sentence imposed on conviction for a substantive offense under Pen C §136.1. See Pen C §136.2(b).

Similarly, a person violating a restraining order as described in Pen C §166(c) in a domestic violence case may be punished for a substantive offense under both Pen C §136.1 or §646.9. See Pen C §166(e)(5). A contempt finding is not a bar to prosecution for violation of Pen C §136.1 or §646.9. Nevertheless, a conviction or acquittal for a substantive offense under either Pen C §136.1 or §646.9 is a bar to a subsequent punishment for contempt arising out of the same act. A person held in contempt for violating Pen C §166(c) is entitled to credit for any punishment imposed as a result of that violation against any sentence imposed on conviction of an offense described in Pen C §136.1 or §646.9. Pen C §166(e)(5).

In *People v Kelley* (1997) 52 CA4th 568, 577, 60 CR2d 653, defendant was convicted of stalking a person he had previously molested. The court held that defendant was properly denied custody credits for time served while he was held in contempt for violating an antistalking order issued under Pen C §166(a)(4). The court noted that, by its terms, Pen C §166(e)(5) applies only to restraining orders issued in criminal domestic violence cases under Pen C §166(c), which was not the case in *Kelley*. See *People v Kelley, supra*, 52 CA4th at 577 (construing former Pen C §166(d)(5), similar to current Pen C §166(e)(5)).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.25 3. When Only Civil Court Protective Order Is in Effect

§3.25 3. When Only Civil Court Protective Order Is in Effect

When only a civil court restraining order is in effect, and that order is violated, a defendant may be prosecuted for a misdemeanor under Pen C §273.6, and may be found in contempt under CCP §1209 in certain cases, depending on whether the contempt sanction is punitive in nature (criminal contempt) or coercive (civil contempt).

It should be noted that the remedies provided by the Domestic Violence Prevention Act (Fam C §§6200 et seq), under which most civil restraining orders are issued, are available in addition to any other civil or criminal remedies. See Fam C §6227.

Generally speaking, when resolving a double jeopardy issue involving prosecution for contempt and for a substantive offense, the criminal court must look to the nature of the prior contempt. If it is civil in nature, double jeopardy does not bar a subsequent prosecution for the same act. If the prior contempt is criminal in nature, a subsequent prosecution is barred. See *People v Batey* (1986) 183 CA3d 1281, 1289, 228 CR 787. If it is found that the contempt proceeding is criminal in nature, the court must apply the *Blockburger* test to determine whether the same elements are present in the charge being prosecuted as were present in the contempt finding. See *Blockburger v U.S.* (1932) 284 US 299, 52 S Ct 180, 76 L Ed 306; for further discussion of *Blockburger,* see §3.27.

When the object of the proceedings is to vindicate the dignity or authority of the court, the proceeding is regarded as criminal in character, even though it arises from, or is ancillary to, a civil action. *Morelli v Superior Court* (1969) 1 C3d 328, 333, 82 CR 375; *People v Batey* (1986) 183 CA3d 1281, 1284-1285, 228 CR 787. If, on the other hand, the sentence is intended to protect and enforce the rights of private parties by compelling obedience to court orders and decrees, the proceeding is said to be civil. *Morelli v Superior Court, supra,* 1 C3d at 333; *People v Derner* (1986) 182 CA3d 588, 592, 227 CR 344.

The California Supreme Court has held that there is no double jeopardy when a person is found in contempt under CCP §§1209 et seq, and charged and convicted under Pen C §166(a)(4). See *In re Morris* (1924) 194 C 63, 227 P 914 (construing predecessor to Pen C §166(a)(4), former Pen C §166(4)); but see *People v Lombardo* (1975) 50 CA3d 849, 123 CR 755 (double jeopardy clause of US Const amend V bars misdemeanor contempt prosecution under Pen C §166 against witness previously found in contempt under CCP §1209 and sentenced to jail for same act or omission—refusing to answer questions at criminal trial of another person after being granted immunity; when court order is punitive in nature, when elements of both offenses are the same, and when the same evidence supports both offenses, prosecution under Pen C §166 is barred by Fifth Amendment double jeopardy clause).

Double jeopardy claims have also been rejected when a parent was found in contempt under CCP §§1209 et seq for failing to return a child after visitation and was later prosecuted for felony child abduction under former Pen C §278.5. See *People v Batey, supra,* 183 CA3d at 1284-1289; *People v Derner, supra,* 182 CA3d at 591-593. In *Batey,* the prior contempt was held to be civil because the punishment was suspended, and the terms indicated a desire to ensure future compliance with court orders for the benefit of the other parent, not to vindicate the authority of the court. *People v Batey, supra,* 183 CA3d at 1288-1289. Similarly, in *Derner,* the contempt was found to be civil when its purpose was to coerce the parent into obeying family law orders in the future rather than to punish, in spite of the fact that the condition for suspending the sentence was that the contemnor violate no laws for one year, a standard condition of probation. *People v Derner, supra,* 182 CA3d at 592-593.

The United States Supreme Court addressed a similar issue in *U.S. v Dixon* (1993) 509 US 688, 113 S Ct 2849, 125 L Ed 2d 556, which involved a double jeopardy challenge to enforcement of a civil protective order. The defendant had been served with a civil order prohibiting him from molesting, assaulting, threatening, or physically abusing his estranged wife. He violated that order by assaulting and threatening her. After being found in contempt and receiving a long jail sentence, he was prosecuted and convicted of simple assault, threatening to injure another, and assault with intent to kill. The appellate court found that all three charges were barred by double jeopardy. *U.S. v Dixon, supra,* 509 US at 692-694. The Supreme Court held that double jeopardy was a bar to the prosecution for simple assault, but was not a bar to prosecution for the other two charges, citing its earlier holding in *Blockburger* regarding the requirement that each offense contain an element not contained in the other. *U.S. v Dixon, supra,* 509 US at 696-697, 700-703; for

further discussion of *Blockburger,* see §3.27.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.26 4. When Only a Juvenile Court Protective Order Is in Effect

§3.26 4. When Only a Juvenile Court Protective Order Is in Effect

When only a juvenile court restraining order is in effect, and that order is violated, a defendant may be prosecuted for a misdemeanor under Pen C §273.65 and may be found in contempt under CCP §1209 in certain cases. See Welf & I C §213.5(h). Information on any juvenile court restraining order related to domestic violence must be transmitted to the Department of Justice under Fam C §6380(b). Welf & I C §213.5(j).

§3.27 5. When Two or More Restraining Orders Are in Effect

In some situations, the defendant may violate two or more restraining orders by the same act(s), for example, by contacting the victim. As long as the contempt proceeding is civil in nature, CCP §1209 is not a bar to prosecution under the Penal Code. See *In re Morris* (1924) 194 C 63, 227 P 914 (construing predecessor to Pen C §166(a)(4), former Pen C §166(4)); but see *People v Lombardo* (1975) 50 CA3d 849, 854, 123 CR 755 (when court order in contempt proceeding under CCP §1209 is punitive in nature, when elements of both offenses are the same, and when same evidence supports both offenses, prosecution under Pen C §166 is barred by double jeopardy clause). See also Pen C §§136.2(b), 166(e)(5).

For discussion of situations in which the victim refuses to testify and the court is considering holding him or her in contempt, see §5.39.

Prosecution under different statutes defining contempt does not automatically violate double jeopardy proscriptions. The United States Supreme Court has held that when the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each statute requires proof of an additional fact that the other does not require. If so, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *Blockburger v U.S.* (1932) 284 US 299, 304, 52 S Ct 180, 76 L Ed 306.

This "same offense" test does not prohibit accumulating punishments at a single trial for multiple statutory offenses simply because they all arise from the same act or transaction. A single, indivisible act may support more than one punishment under separate statutory provisions if each provision requires proof of a fact that the other does not. See, *e.g.*, *U.S. v Woodward* (1985) 469 US 105, 105 S Ct 611, 83 L Ed 2d 518 (proof of currency reporting violation does not necessarily include proof of false statement offense; defendant could be convicted of and receive consecutive punishments for two offenses without offending double jeopardy). It therefore follows that when two or more restraining orders are violated by one act, double jeopardy does not necessarily attach, because each order is separate. See also *U.S. v Dixon* (1993) 509 US 688, 113 S Ct 2849, 125 L Ed 2d 556, discussed in §3.25, which dealt with the violation of a single order, enforced first through contempt, and later through prosecution for substantive offenses.

§3.28 6. When Multiple Punishment May Be Imposed

An act or omission punishable in different ways under different provisions of law must be punished under the provision providing for the longest potential term of imprisonment. In no case may the act or omission be punished under more than one provision. An acquittal or conviction and sentence under one provision bars a prosecution for the same act or omission under another provision. Pen C §654(a). Thus, Pen C §654 prohibits multiple punishment for a single act or omission, or for an indivisible course of conduct. *People v Deloza* (1998) 18 C4th 585, 591, 76 CR2d 255; *People v Le* (2006) 136 CA4th 925, 39 CR3d 146. The statute has been held applicable to punishment for contempt. *In re Farr* (1976) 64 CA3d 605, 613, 134 CR 595; *Mitchell v Superior Court* (1989) 49 C3d 1230, 1246, 265 CR 144.

Penal Code §654 does not allow any multiple punishment, including either concurrent or consecutive sentences. *People v Deloza, supra,* 18 C4th at 592. For example, if a defendant suffers two convictions, one for which punishment is precluded by Pen C §654, the statute requires the sentence for one conviction to be imposed, and the other to be imposed and stayed. 18 C4th at 591-592. However, Pen C §654 does not preclude multiple punishment when the defendant's violent act injures different victims. 18 C4th at 592. In addition, multiple crimes arising from a single course of criminal conduct may be punished separately, notwithstanding Pen C §654, if the acts constituting the various crimes serve separate criminal objectives. *People v Davey* (2005) 133 CA4th 384, 390, 34 CR3d 811.

The test of whether Pen C §654 bars multiple punishment under two or more statutes for the same act turns on the facts of each case. For instance, it is the defendant's intent and objective, not the temporal proximity of his or her offenses, that determines whether a transaction is indivisible. *People v Hicks* (1993) 6 C4th 784, 789, 25 CR2d 469; *People v Harrison* (1989) 48 C3d 321, 335, 256 CR 401. If all the offenses were merely incidental to or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and may be punished only once. *People v Harrison, supra,* 48 C3d at 335; *People v Palmore* (2000) 79 CA4th 1290, 1297, 94 CR2d 784. On the other hand, if defendant harbored multiple criminal objectives that were independent of and not merely incidental to each other, he or she may be punished for each statutory violation committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." *People v Harrison, supra,* 48 C3d at 335; *People v Beamon* (1973) 8 C3d 625, 639, 105 CR 681. See also Pen C §136.2(b) (contempt finding does not bar prosecution under Pen C §136.1, although person held in contempt is entitled to credit for any punishment against sentence imposed on Pen C §136.1 conviction); Pen C §166(e)(5) (contempt finding does not bar prosecution under Pen C §136.1 or §646.9, although person held in contempt is entitled to credit for any punishment against sentence imposed on conviction under Pen C §136.1 or §646.9); Pen C §140(b) (person punished under another provision of law for using or threatening to use force or violence on witness or victim of crime as described in Pen C §140(a) cannot receive additional imprisonment under Pen C §140).

In *People v Kelley* (1997) 52 CA4th 568, 574-576, 60 CR2d 653, the court held that defendant's prosecution for stalking after he had already been convicted of misdemeanor contempt for violating a restraining order against stalking under Pen C §166 did not violate either the Pen C §654 prohibition against successive prosecutions for the same crime or the constitutional prohibition against double jeopardy. Noting that at least some of the acts giving rise to the stalking charge against defendant occurred after his prosecution for violation of the restraining order, the court held that Pen C §654 should not prohibit multiple prosecutions in such a situation. The purpose of Pen C §654 is to prevent harassment of the defendant by successive prosecutions for the same conduct; prosecution for a greater offense after the defendant has been punished and resumed the criminal behavior cannot be characterized as harassment. *People v Kelley, supra,* 52 CA4th at 575. The court further held that the provisions relating to violation of a restraining order create a punishment enhancement, but do not define a crime, and therefore are not considered in double jeopardy analysis. 52 CA4th at 576.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/3 Criminal Protective Orders/§3.29 7. Chart: Double Jeopardy and Pen C §654

§3.29 7. Chart: Double Jeopardy and Pen C §654

Fact Situation	Any Court Order Pen C §166(a)(4)	Civil Order CCP §1209(a)(5)[a]	Juvenile Order Pen C §237.65	Civil Order Pen C §273.6	Criminal Order Pen C §136.1	Criminal Order Pen C §166(c)
Criminal order violated; no civil order [a]	x				x	x
Civil order violated; no criminal order [a]	x	x		x		
Juvenile order violated, no civil order	x	x	x			
Juvenile order violated, no criminal order	x	x	x			
Both juvenile and criminal orders violated by same act [b]	x	x	x		x	x
Both criminal and civil orders violated by same act [ab]	x	x		x	x	x

[a] CCP §1209 contempt action must be civil in nature before prosecution under a Penal Code section is allowable.

[b] Although the defendant can be *prosecuted* and *convicted* of multiple Penal Code sections for the same act, Pen C §§136.2(g), 140(b), and 166(e)(5) bar *punishment* for more than one code section violation. This is consistent with Pen C §654's ban on multiple punishment.

4

Case Dispositions Before Trial

§4.1 I. OVERVIEW OF CASE DISPOSITIONS IN DOMESTIC VIOLENCE CASES

An appropriate disposition in a domestic violence case is based on an understanding of the societal and familial context in which domestic violence occurs. A disposition that challenges the conditions in which domestic violence festers can play a powerful role in deterring future violence.

Violence against wives or female intimates has long been tolerated and even condoned by our social norms and institutions. In the past, this violence has been viewed as a private family matter that, if left alone, could be resolved without intervention.

As the ultimate authority in our legal system, the court can send a powerful message to both the victim and defendant that violence within the home will no longer be tolerated and will be treated as a serious crime. This message can be conveyed, not only in the disposition, but also in the statements made from the bench. The U.S. Attorney General's Task Force on Family Violence, Final Report, *Recommendations for Judges* (Washington, D.C.: U.S. Department of Justice, 1984) noted: "Even a stern admonition from the bench can help to deter the defendant from future violence."

Experts in treating domestic violence offenders have found that domestic violence is the result of the defendant's strong need to exercise power and control over the victim. See Power and Control Wheel, Duluth Abuse Intervention Project, in Appendix A; Ganley, *Perpetrators of Domestic Violence: An Overview of Counseling the Court-Mandated Client,* Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence (New York: Springer Pubs. Co., 1986). Violence provides a very effective, short-term method of maintaining this control. Domestic violence offenders have often learned in their own families that violent behavior gives the violent individual the ultimate power within the family. Some victims of domestic violence also grew up in violent families where they received similar messages. These messages are reinforced by society and by the failure of our institutions to intervene or to condemn this violence.

The court can counteract the belief that violence is an effective means of maintaining power and control by imposing negative consequences in the form of legal sanctions on the behavior. In addition, the defendant's control over the victim is partially severed when the court makes it clear that the criminal justice system controls the case, not the defendant or the victim. In this way, the defendant learns that coercing or battering the victim into requesting that charges be dismissed is no longer an effective means of avoiding criminal sanctions.

By the time a domestic violence case reaches the courtroom, there has often been a history of escalating violence. The offender may attempt to cope with the psychological and emotional contradictions that arise as a result of violence toward a spouse or intimate by distorting the reality of the violence. This distortion most often takes the form of minimizing and denying the violence, and/or externalizing the responsibility for the violence onto others. This is seen in statements such as "I only pushed her," "I couldn't help it; she pushed my buttons," "I had an argument with my boss," or "I was drunk."

In her article, *Perpetrators of Domestic Violence: An Overview of Counseling the Court-Mandated Client,* cited above, Dr. Anne Ganley articulates the court's critical role in addressing this minimization (at p 157):

> When individuals deny or minimize their behavior or attribute its responsibility to others, they are unlikely to change that behavior. Through both the criminal justice process and mandated counseling, the court cuts through some of the minimization, denial, and externalization by holding the individual responsible for his battering behavior, and for changing that behavior so that future violence will not occur.

In sum, whether a domestic violence case results in conviction and sentencing or dismissal, the court's handling of the case plays a critical role in intervening in the situation that permits domestic violence to continue and to escalate.

§4.2 II. VICTIM NOTIFICATION

Penal Code §679.02 sets forth statutory rights of victims and witnesses of crimes, including the right to notification about criminal proceedings in cases in which they are involved. That section includes the right of a victim in a case involving a violent felony, as defined Pen C §667.5(c), to be notified by the district attorney's office of a pending pretrial disposition before a change in plea is entered before a judge. Pen C §679.02(a)(12). When the case is a homicide, the victim's next of kin have a right to be notified of a pending pretrial disposition before a change in plea is entered. See Pen C §679.02(a)(12). In addition, in such cases (Pen C §679.02(a)(12)):

(1) A victim of any felony may request to be notified by the district attorney's office of a pretrial disposition.

(2) If it is not possible to notify the victim of the pretrial disposition before the change of plea is entered, the district attorney's office or the county probation department must notify the victim as soon as possible.

(3) The victim may be notified by any reasonable means available.

Although Pen C §679.02(a) requires notification by the prosecutor rather than by the court, the judge may want to remind the prosecutor of this duty when considering accepting a guilty plea, and the judge may ask the opinion of the victim or victim's next of kin regarding the proposed disposition. See also §6.4 regarding the victim's right of allocution.

Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), passed by California voters on November 4, 2008, added Cal Const art I, §28(b)(6), which provides that victims have a right, on request, to be notified and informed before any pretrial disposition. Victims also have a right to be heard, on request, on the issue of any pretrial disposition. Cal Const art I, §28(b)(8).

Whenever a crime has been committed against a victim, the law enforcement officer assigned to the case may provide the victim with a "Victim's Rights Card," as provided in Pen C §679.08(b). Pen C §679.08(a). In addition, each law enforcement agency must provide, free of charge, a copy of a report relating to a domestic violence incident to a victim on request. Fam C §6228(a). If the victim is deceased, his or her representative is entitled to the domestic violence incident report. See Fam C §6228(a), (g).

Penal Code §679.026, added by Proposition 9, requires law enforcement agencies and prosecutors to give victims written notice of their rights, enumerated in Cal Const art I, §28 ("Marsy Rights"), at the time of their initial contact.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/4 Case Dispositions Before Trial/ III. DIVERSION AND DEFERRED ENTRY OF JUDGMENT PROGRAMS/§4.3 A. Misdemeanor Domestic Violence Diversion and Other Informal Dispositions No Longer Authorized

III. DIVERSION AND DEFERRED ENTRY OF JUDGMENT PROGRAMS

§4.3 A. Misdemeanor Domestic Violence Diversion and Other Informal Dispositions No Longer Authorized

Domestic violence diversion is no longer authorized for defendants charged with misdemeanor domestic violence, in light of the Legislature's repeal of Chapter 2.6 of Title 6 of Part 2, Pen C §§1000.6 et seq. See Stats 1995, ch 641, §2; *People v Laino* (2004) 32 C4th 878, 897-898, 11 CR3d 723 (discussing reasons for repeal of domestic violence misdemeanor diversion program). At the same time, the Legislature significantly amended Pen C §1203.097, providing for specific probationary terms for domestic violence defendants, including the content of the batterer's treatment counseling program. See Stats 1995, ch 641, §3; for further discussion of Pen C §1203.097, see §§6.26-6.27. California has never had a diversion program for domestic violence felonies. 32 C4th at 897.

In some counties, rather than finding a domestic violence defendant guilty or acquitting him or her, criminal courts have created orders for "deferred prosecution," "conditional pleas," or "court probation." These responses essentially consist of the judge telling the alleged batterer that if he or she does not re-offend within a certain period, and/or if he or she attends some minimal amount of counseling, the charges will be dropped. Some courts have employed an additional practice of referring batterers to generic misdemeanor diversion programs under Pen C §§1001 et seq.

There are several problems with these dispositions. First, they are not authorized by the Penal Code, which clearly spells out the permitted response under Pen C §1203.097. Second, these dispositions embody many of the problems inherent in the former domestic violence diversion program:

- They communicate the message that domestic violence is not criminal behavior,
- They are used as a calendar management tool,
- They provide no system of formal monitoring, and
- They do not recognize the fact that many defendants who appear to be first-time offenders have previously committed domestic violence assaults.

At the same time, these "informal diversion" dispositions do not incorporate even the minimal protections in the former diversion program, such as:

- Mandatory stay-away orders from the victim,
- Specifications regarding the type and length of the batterer's treatment counseling, and
- Provisions regarding how often a defendant may use diversion and in what types of cases.

Thus, these dispositions are a step backward from the former diversion program, which had been criticized by many sources. See, *e.g.,* California Auditor General's Report, *The Administration of the State's Domestic Violence Diversion Could Be Improved* (1990).

Furthermore, the state Supreme Court and several appellate courts have specifically disallowed "informal diversion" arrangements in which the judge agrees to dismiss charges if the defendant does not re-offend within a specified period of time. See *People v Orin* (1975) 13 C3d 937, 120 CR 65; *People v Padfield* (1982) 136 CA3d 218, 231, 185 CR 903; *People v Tapia* (1982) 129 CA3d Supp 1, 4-9, 181 CR 382; *People v Municipal Court* (Gelardi) (1978) 84 CA3d 692, 695-700, 149 CR 30. See also 68 Ops Cal Atty Gen 1 (1984).

In some cases, there is not enough evidence to obtain a conviction. Nevertheless, the alternatives of "deferred prosecution," "conditional pleas," or "court probation" are not authorized or recommended even in these instances. Of course, the court is free to recommend that the batterer obtain help for his or her problem even if the charges are being dismissed. Additionally, even if the charges are dismissed, the court can still send a clear message to the parties regarding reasons for dismissal and why there should be no repeat incidents necessitating future filings.

For all the above reasons, many judges recommend that courts not attempt to create new methods of dealing with domestic violence criminal cases, and instead follow the clear legislative directives in Pen C §1203.097.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/4 Case Dispositions Before Trial/§4.4 B. Deferred Entry of Judgment for Drug Offenders

§4.4 B. Deferred Entry of Judgment for Drug Offenders

Although sometimes related, violence and substance abuse are separate issues requiring separate treatment programs. In cases in which the defendant appears to have a substance abuse problem, and is charged with a drug offense, he or she may be eligible to participate in the drug deferred entry of judgment (DEJ) program (see Pen C §§1000-1000.8). Under the DEJ, the defendant pleads guilty to the offense, and the court defers entry of judgment and refers the defendant to an education, treatment, or rehabilitation program. If the defendant successfully completes the assigned program, the criminal charge is dismissed. Pen C §1000.3.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/4 Case Dispositions Before Trial/§4.5 C. Child Abuse and Neglect Counseling

§4.5 C. Child Abuse and Neglect Counseling

Children are often abused in domestic violence cases. The prosecutor may refer a defendant who is suspected of committing an act of physical abuse of a child or child neglect to the county social services department or the probation department for counseling, psychological treatment, or other necessary services instead of prosecution. Pen C §1000.12(b). Defendants charged with sexual abuse or molestation of a child, or any sexual offense involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury, are not eligible for this program. Pen C §1000.12(c).

IV. DISMISSALS

§4.6 A. Judicial Authority Under Pen C §1385

The judge or magistrate may, either on his or her own motion or on the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered in the minutes. No dismissal may be made for any cause that would be grounds for demurrer to the accusatory pleading. Pen C §1385(a). When determining whether a dismissal will further the interests of justice, the court must consider both the constitutional rights of the defendant and the interests of society, as represented by the prosecution. *People v Orin* (1975) 13 C3d 937, 945, 120 CR 65; *People v Thorbourn* (2004) 121 CA4th 1083, 1088, 18 CR3d 77.

The statutory requirement that a statement of reasons for dismissal must be entered in the minutes is for the purpose of protecting the public interest against improper or corrupt dismissals and imposing a purposeful restraint on the exercise of judicial power. *People v Bonnetta* (2009) 46 C4th 143, 149-150, 92 CR3d 370; *People v Orin, supra,* 13 C3d at 944. In the absence of such a statement, the order may not be considered a dismissal under Pen C §1385. *People v Hunt* (1977) 19 C3d 888, 897, 140 CR 651. See also Pen C §1192.6(a) (requiring statement of reasons in record if felony is amended or dismissed). A court's statement that a Pen C §1385 dismissal is in "furtherance of justice" is not a sufficient statement of a reason. *People v Curtiss* (1970) 4 CA3d 123, 127, 84 CR 106. One dismissal bars further prosecution in most misdemeanor cases. Pen C §1387(a). A felony offense can be refiled once (Pen C §§1387, 1388), and in some cases twice (Pen C §1387.1). There is an exception in felony cases if the termination of the action was the result of direct intimidation of a material witness. Pen C §1387(a)(2).

Penal Code §1387(a)(3) adds an additional exception to the rule that a dismissal is a bar to further prosecution: when the court finds that terminating the action was the result of the failure of the subpoenaed complaining witness to appear in cases arising under Pen C §243(e), §262, §273.5, or §273.6. This exception applies only within six months of the original dismissal of the action and may be invoked only once in each action. Pen C §1387(a)(3).

Dismissal is not a bar in a misdemeanor prosecution of a domestic violence offense as defined in Pen C §13700(a)-(b), when the dismissal arose from the failure of the personally subpoenaed complaining witness to appear. The same time limitations apply to this exception as to Pen C §1387(a)(3). Pen C §1387(b).

§4.7 1. Proper Use of Pen C §1385

The trial court generally has the authority under Pen C §1385 to dismiss or strike a prior conviction alleged as an enhancement in furtherance of justice, absent a clear legislative intent to the contrary. *People v Meloney* (2003) 30 C4th 1145, 1155, 135 CR2d 602; *People v Thomas* (1992) 4 C4th 206, 210-211, 14 CR2d 174; see *People v Tenorio* (1970) 3 C3d 89, 89 CR 249. If the court may strike or dismiss an enhancement under Pen C §1385(a), it may instead strike the additional punishment for that enhancement if doing so is in the furtherance of justice under Pen C §1385(a). Pen C §1385(c)(1). Nevertheless, Pen C §1385(c) does not permit the court to strike additional punishment for an enhancement that cannot be stricken or dismissed under Pen C §1385(a). Pen C §1385(c)(2).

Penal Code §1385 also states that the court may not strike a serious felony prior conviction alleged as an enhancement under Pen C §667, California's three-strikes law. Pen C §1385(b); see also Pen C §1385.1 (judge cannot strike or dismiss special circumstance admitted by plea of guilty or no contest or found by jury or court under Pen C §§190.1-190.5). However, the California Supreme Court has held that Pen C §1385(a) continues to apply to cases brought under the three-strikes law. *People v Superior Court* (Romero) (1996) 13 C4th 497, 518-532, 53 CR2d 789. To avoid interpreting Pen C §1385 to give prosecuting attorneys veto power over judicial decisions to terminate criminal actions, thus creating separation of powers issues, the court found that the three-strikes law allows prosecutors to move to strike or dismiss prior felony allegations, while Pen C §1385(a) allows courts to strike or dismiss such priors on their own motion. 13 C4th at 518-530; see Pen C §667(f)(2).

§4.8 2. Improper Use of Pen C §1385

The following are improper grounds for dismissal under Pen C §1385:

(1) *Prospect of rehabilitation.* A dismissal based on the belief that it will help effectuate the defendant's rehabilitation is not an appropriate use of Pen C §1385. In *People v McAlonan* (1972) 22 CA3d 982, 99 CR 733, the judge, although personally convinced of defendant's guilt, dismissed a marijuana charge so that the defendant could enter the Navy. The appellate court held that this was an improper use of Pen C §1385, stating: "[W]e are convinced society's interest that justice be dispensed with an even hand and in accordance with statutory authority precludes use of the dismissal statute to avoid conviction." 22 CA3d at 987. The court added that judges may properly consider legislatively provided alternatives at sentencing rather than at a hearing to consider dismissal. *People v McAlonan*, *supra*.

(2) *Congested calendar.* Although increased domestic violence arrests and prosecutions may appear to congest court calendars, dismissal on these grounds is improper. *People v Mack* (1975) 52 CA3d 680, 684, 125 CR 188.

(3) *Judicial antipathy to three-strikes law.* A court acts improperly in granting dismissal if guided solely by personal antipathy for the effect that the three-strikes law would have on a defendant, while ignoring defendant's background, the nature of his or her present offenses, and other individualized considerations. *People v Superior Court* (Romero) (1996) 13 C4th 497, 531, 53 CR2d 789; see *People v Dent* (1995) 38 CA4th 1726, 1729-1731, 45 CR2d 746 (trial court abused its discretion in finding "wobbler" offense to be misdemeanor under Pen C §17(b) rather than felony only to escape consequences of three-strikes law).

(4) *Availability of civil remedy.* Although domestic violence victims may have certain civil remedies available, such as restraining orders or personal injury suits, the existence of these remedies is not a proper basis for dismissal under Pen C §1385. See *People v Curtiss* (1970) 4 CA3d 123, 84 CR 106 (trial court abused its discretion in dismissing grand theft charge against defendant for orally stated reason that court was not running a collection agency).

(5) *Informal diversion programs*. Several cases, including *People v Municipal Court* (Gelardi) (1978) 84 CA3d 692, 695-700, 149 CR 30, have held that the court cannot use Pen C §1385 to create informal diversion programs. In *Gelardi,* the court condemned a Marin County municipal court practice of continuing misdemeanor cases for possible dismissal if defendant committed no further violations. There are no legislatively mandated domestic violence diversion programs in California, and both Supreme Court and appellate court cases prohibit the judicial creation of such programs. See §4.3.

(6) *Quashing subpoena for prosecution witness.* Improper quashing of a subpoena for a prosecution witness has been held tantamount to dismissal and an abuse of discretion under Pen C §1385. *People v Superior Court* (Long) (1976) 56 CA3d 374, 378-379, 126 CR 465 (improper to quash when alleged incest victim testified at preliminary examination that she wished to reconcile with mother and stepfather-defendant, and that testifying at trial would prevent this).

(7) *Penal Code §654.* A court may not dismiss one charge after the defendant pleads guilty to a related charge because it believes that the charge will be subject to the Pen C §654 prohibition on multiple punishment for the same act. See *People v Andrade* (1978) 86 CA3d 963, 973-976, 150 CR 662 (court's reasons for dismissal not stated in minutes).

(8) *When victim requests dismissal.* Although requiring the victim to testify is a difficult decision, it may be best in some cases of domestic violence. The alternative of dismissing the case may ultimately be more dangerous for the victim and may encourage the defendant to continue the violent behavior. In any event, when the alleged offender brings the victim to court to request dismissal of the charges, it is strongly recommended that the court ask someone to talk to the victim out of the presence of the alleged offender to determine if the victim is there because of duress. Victim-witness staff may be a useful resource for this procedure. See §4.9.

§4.9 3. Recommended Procedures When Victim Requests Dismissal

Before dismissing domestic violence charges on the request of the victim, the court should ascertain whether the victim has been coerced into requesting dismissal of the charges. At the hearing, the victim should be present. If possible, the defendant should be removed from the courtroom to reduce intimidation of the victim. After swearing the victim, the court should inquire whether the victim sincerely wants the charges dismissed, the reasons for the request, whether the defendant has threatened the victim, or if the victim fears the defendant for other reasons, and how the victim received the injuries alleged. For a checklist to assist the court in assessing reasons underlying victim reluctance to testify, see §5.32.

When it is unclear whether coercion or intimidation is a factor in the victim's reluctance, the court may find it useful to continue the case for a period of hours or days to permit the victim to obtain information and advice on options about counseling from the victim-witness program, and/or from the local domestic violence program. Victim advocates can give support and information to the victim and can assist in setting up a safety plan.

Courts should use the power to dismiss domestic violence charges based on the victim's request very sparingly. Such dismissals may reinforce both the victim's and defendant's belief that domestic violence is a private, noncriminal matter, and that the criminal justice system is not a resource for the victim in breaking the cycle of violence. If dismissals are automatically granted whenever the victim requests it, the message to the batterer and to the victim is that the victim, not the criminal justice system, controls the case. This provides the batterer with less incentive to stop the violent behavior because he or she comes to see that criminal court action can be avoided through intimidation and control of the victim. If, on the other hand, dismissals are not automatically granted on the victim's request, the message is clear to both parties that domestic violence is not a civil matter involving "merely" the private good of the victim, but is instead a public offense brought on behalf of the People.

When a court decides to dismiss, it should recommend that the defendant voluntarily seek help from a batterer's program and that the victim contact the local domestic violence agency or shelter for information and support services. The court should clearly state to the batterer and the victim that, even though the current charges may be dropped, domestic violence is criminal behavior that will not be tolerated. The court should note that if subsequent domestic violence assaults come to the attention of the police, prosecutor, or judge, the batterer will be treated more severely because the fact of the previous arrest will stay on the batterer's record. It is also recommended that the court tell the victim that he or she should not hesitate to call the police or sheriff in the event of another assault.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/4 Case Dispositions Before Trial/§4.10 B. No Civil Compromise of Domestic Violence Offenses

§4.10 B. No Civil Compromise of Domestic Violence Offenses

Penal Code §1377 prohibits civil compromise of misdemeanor domestic violence offenses. Specifically, Pen C §1377 excludes from civil compromise misdemeanor offenses committed:

- In violation of a protective order under Pen C §273.6 or in violation of a protective order in a juvenile court proceeding under Welf & I C §213.5, §304, or §362.4. See Pen C §§1377(d), 273.6, 273.65. It is possible that protective orders issued in parental custody cases under Welf & I C §726.5 may be included in the restriction as well, since Welf & I C §726.5 permits the issuance of protective orders under Welf & I C §213.5. See Welf & I C §726.5(a).
- By or on a family or household member, or on spouse or former spouse, cohabitant or former cohabitant, a person with whom the defendant has or had a dating or engagement relationship, a co-parent of a child, a child of a defendant or victim or a child who is the subject of an action under the Uniform Parentage Act, or any other person related by consanguinity or affinity within the second degree. See Pen C §§1377(e), 13700(b); Fam C §6211.

Also exempt from civil compromise are misdemeanor offenses of elder or child neglect or abuse. Pen C §1377(f)-(g).

5

Considerations at Preliminary Hearing or Trial

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/ I. DOMESTIC VIOLENCE VICTIM-COUNSELOR PRIVILEGE/§5.1 A. Scope of Privilege; Confidential Communication Defined

I. DOMESTIC VIOLENCE VICTIM-COUNSELOR PRIVILEGE

§5.1 A. Scope of Privilege; Confidential Communication Defined

In 1986, the California Legislature created the domestic violence victim-counselor privilege. See Evid C §§1037-1037.8; Stats 1986, ch 854, § 1. The privilege protects confidential communications between the victim and a domestic violence counselor. See Evid C §1037.2. For purposes of the privilege, domestic violence is defined as set forth in Fam C §6211. Evid C §1037.7.

The privilege authorizes the nondisclosure of, and the prevention of another from disclosing, a confidential communication between the victim and a domestic violence counselor. Evid C §1037.5. "Confidential communication" is defined as "any information, including, but not limited to, written or oral communication, transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons" other than those present to further the interests of the victim in the consultation or those to whom disclosure is reasonably necessary to transmit information or to accomplish the purposes for which the counselor is consulted. Evid C §1037.2(a). For discussion of when disclosure to third persons is authorized, see §5.8. All information regarding the facts and circumstances of any domestic violence incident, the children of the victim or abuser, and the relationship of the victim with the abuser is expressly included within the scope of the statute. See Evid C §1037.2(a).

Under Evid C §917, there is a presumption that certain communications are confidential, such as those between attorney and client, physician and patient, psychotherapist and patient, clergyman and penitent, and husband and wife. This presumption also applies to the domestic violence counselor-victim relationship. See Evid C §917(a). Accordingly, such communications are presumed to have been made in confidence. Evid C §917(a). A domestic violence counselor must inform a domestic violence victim of any applicable limitations on the confidentiality of communications between the victim and the domestic violence counselor. The counselor may give this notice orally. Evid C §1037.8.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/ B. Domestic Violence Counselor Defined/§5.2 1. Domestic Violence Victim Service Organization Staff and Volunteers

B. Domestic Violence Counselor Defined

§5.2 1. Domestic Violence Victim Service Organization Staff and Volunteers

For purposes of the privilege, a domestic violence counselor is defined to include a person who is employed by a domestic violence victim service organization, such as a battered women's shelter, for the purpose of rendering advice or assistance to victims of domestic violence, regardless of whether the person is financially compensated. Evid C §1037.1(a)(1). See Evid C §1037.1(b) (domestic violence victim service organization defined). Training requirements for domestic violence counselors are outlined in Evid C §1037.1(a)(1)-(3).

The issue of a counselor's qualifications is a question of preliminary fact that must be heard and decided independently by the judge under Evid C §§400-402 and 405. See Evid C §400. Testimony may be presented on these issues. See Evid C §405(a). Such evidence typically consists of examination and cross-examination of the witness.

§5.3 2. Victim-Witness Assistance Staff and Volunteers

Evidence Code §1037.1(b)(2) provides that a domestic violence victim service organization includes "programs with the primary mission to provide services to victims of domestic violence whether or not that program exists in an agency that provides additional services." Such a program is a nonprofit victim-witness assistance program specified by Pen C §13835.2. Persons employed by the victim-witness assistance program for the purpose of assisting and counseling domestic violence victims are domestic violence counselors as defined by Evid C §1037.1(a)(1). Victim-witness programs provide comprehensive services to crime victims and witnesses, and they assist victims in submitting claims to the Victim-Witness Assistance Fund. See Pen C §13835.2(a)(1), (4).

Whether the victim-witness staff is part of the prosecution team varies from county to county. This issue is important because a witness may give information to the victim-witness advocate that is favorable to the defendant. This information may be required to be disclosed by the prosecution. See Pen C §1054.1(e) (material to be disclosed by prosecutor to defendant or defendant's attorney if in possession of prosecutor or if prosecutor knows it to be in possession of investigating agencies); *Brady v Maryland* (1963) 373 US 83, 87, 83 S Ct 1194, 10 L Ed 2d 215 (violation of due process to withhold from defendant favorable evidence that is material to guilt or punishment). The important determinant is whether the person or agency has been acting on the government's behalf or assisting the government's case. Information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material. *People v Superior Court* (Barrett) (2000) 80 CA4th 1305, 1315, 96 CR2d 264.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.4 C. Persons Included in Domestic Violence Definition

§5.4 C. Persons Included in Domestic Violence Definition

Evidence Code §1037.7 defines domestic violence by reference to Fam C §6211. Thus, for purposes of Evid C §§1037 et seq, domestic violence is abuse perpetrated against a spouse or former spouse, cohabitant or former cohabitant, a person with whom the defendant has or had a dating or engagement relationship, a co-parent of a child, a child of a defendant or victim or a child who is the subject of an action under the Uniform Parentage Act, and any other person related by consanguinity or affinity within the second degree. See Fam C §6211; §1.2.

A cohabitant is defined for purposes of Fam C §6211 as a person who regularly resides in the household. See Fam C §§6209, 6211. Thus, in a situation in which the parties each sublet separate bedrooms from a lessee, there was no romantic or friendly relationship between them, and they did not know each other before the sublet, a restraining order issued under the Domestic Violence Prevention Act (Fam C §§6200-6390) against one of the subleasing parties has been held invalid. *O'Kane v Irvine* (1996) 47 CA4th 207, 211-212, 54 CR2d 549. The court found that under the facts, the parties could not be considered cohabitants because they did not regularly reside together within the meaning of Fam C §§6209(b) and 6211, since they did not regularly reside in the same household. *O'Kane v Irvine, supra,* 47 CA4th at 212.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.5 D. Holder(s) of Privilege; Who May or Must Claim Privilege

§5.5 D. Holder(s) of Privilege; Who May or Must Claim Privilege

The holder of the domestic violence victim-counselor privilege is the victim, or the victim's guardian or conservator if the victim has a guardian or conservator, unless the guardian or conservator is accused of perpetrating domestic violence against the victim. Evid C §1037.4(a)-(b). The domestic violence victim-counselor privilege may cover two or more persons who jointly consult a domestic violence counselor in a support or therapy group. Evid C §912(b). They are then joint holders of the privilege as joint clients. A waiver by one of the joint privilege holders does not preclude the other from claiming the privilege and preventing disclosure of a privileged communication. Evid C §912(b). See also Jefferson's California Evidence Benchbook §§41.17-41.29 (4th ed CJA-CEB 2009).

The privilege may be claimed by (Evid C §1037.5):

(1) The holder of the privilege.

(2) A person authorized to claim the privilege by the holder.

(3) The person who was the domestic violence counselor at the time of the confidential communication.

The domestic violence counselor who received or made a communication subject to the privilege granted by Evid C §§1037 et seq must claim the privilege whenever he or she is present when the communication is sought to be disclosed, provided the counselor is authorized to claim the privilege under Evid C §1037.5(c). Evid C §1037.6. A domestic violence counselor may not claim the privilege if there is no privilege holder in existence (*e.g.,* the victim has died), or if the counselor is instructed not to claim the privilege by a person authorized to permit disclosure. Evid C §1037.5(c).

When neither the witness nor a party is authorized to claim the privilege, the judge may be required to exclude privileged information on his or her own motion, or on the motion of a party. Evid C §916(a); see *People v Corona* (1989) 211 CA3d 529, 539-540, 544, 259 CR 524 (construing Evid C §916 as applied to consular privilege). The judge may not exclude information under Evid C §916 if he or she is instructed not to do so by a person authorized to permit disclosure, or if the proponent of the evidence establishes that no person authorized to claim the privilege exists. Evid C §916(b).

The court should ask the prosecutor if there are any undisclosed statements for which a privilege is asserted. This is necessary to prevent a defense claim that failure to disclose such statements violated a standing order for discovery. If the victim has not yet authorized the prosecutor to assert the privilege, but is not present to assert it himself or herself, the prosecutor may assert it by making a motion under Evid C §916 or under Evid C §1040(b)(2) (disclosure of official information against public interest).

§5.6 E. Burden of Proof as to Privilege

When a person claims the domestic violence victim-counselor privilege as a bar to disclosure, the claimant has the initial burden of proving preliminary facts to show that the privilege applies. See *Story v Superior Court* (2003) 109 CA4th 1007, 1014, 135 CR2d 532; *Mahoney v Superior Court* (1983) 142 CA3d 937, 940-941, 191 CR 425 (both construing psychotherapist-patient privilege under Evid C §917). Thus, the claimant of the privilege has the burden of proving the existence of the domestic violence victim-counselor relationship, meaning that: (1) the person consulted was a domestic violence counselor within the meaning of Evid C §1037.1(a); and (2) the claimant was a victim under Evid C §1037 who suffered domestic violence as defined by Evid C §1037.7. See *Story v Superior Court, supra*; *Mahoney v Superior Court, supra*.

Once the claimant of the privilege proves preliminary facts showing that the privilege applies, the burden shifts to the opponent of the claim of privilege to establish that disclosure should be allowed. See Evid C §917(a); *Roman Catholic Archbishop of Los Angeles v Superior Court* (2005) 131 CA4th 417, 442, 32 CR3d 209 (construing clergy-penitent privilege); *Story v Superior Court, supra,* 109 CA4th at 1015 (construing psychotherapist-patient privilege). To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in Evid C §917. Alternatively, the opponent of the privilege may show that the privilege has been waived under Evid C §912. See *Story v Superior Court, supra* (construing psychotherapist-patient privilege). For discussion of waiver of domestic violence victim-counselor privilege, see §5.7.

§5.7 F. Waiver of Privilege

The domestic violence victim-counselor privilege does not specifically provide for waiver. The privilege, however, is covered by the general waiver provisions of Evid C §912. See Evid C §912(a). Under Evid C §912, the right of any person to claim the domestic violence counselor-victim privilege is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, discloses a significant part of the communication or consents to disclosure made by another. Consent to disclosure is manifested by any statement or other conduct of the privilege holder indicating consent to disclosure, including failure to claim the privilege in a proceeding in which the holder has legal standing and an opportunity to claim the privilege. Evid C §912(a).

Therefore, the privilege is unavailable to a victim who does not comply with the statutory requisites for claiming it. See Evid C §912(a). For example, if the victim makes a nonconfidential communication of the information, it appears that the privilege is waived. See Evid C §§912(a), 1037.2. Such voluntary disclosure by the holder presumably waives the right of every other person to claim the privilege except when there are joint holders of the privilege. See Evid C §912(b); Jefferson's California Evidence Benchbook §§37.5, 41.25 (4th ed CJA-CEB 2009). For further discussion of disclosure, see §§5.8 et seq. Additionally, the privilege may be waived if no holder of the privilege claims it. See Evid C §912(a). A counselor's failure to claim the privilege when the counselor is present at a time that the communication is sought to be disclosed, as required by Evid C §1037.6, does not result in waiver because the counselor is not a holder of the privilege under Evid C §1037.4. See Evid C §912(a).

G. Disclosure

§5.8 1. To Third Persons

Disclosure of a confidential communication between the domestic violence counselor and the victim to third persons who are present to further the interests of the victim in consulting with the domestic violence counselor does not result in waiver of the privilege. Evid C §1037.2(a). Similarly, disclosure of information to persons to whom disclosure is reasonably necessary for transmitting information or to accomplish the purposes for which the domestic violence counselor is consulted does not waive the privilege. Evid C §§912(d), 1037.2(a). Such third persons would presumably include the victim's friends or relatives who are present during an interview, other victims in a support or therapy group, interpreters, and the counselor's supervisor.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.9 2. Disclosure That Is Itself Privileged

§5.9 2. Disclosure That Is Itself Privileged

A disclosure that is itself privileged is not a waiver of any privilege. Evid C §912(c). For example, if the victim and the defendant are married, disclosure of a privileged communication between the victim and a domestic violence counselor to the defendant-spouse would probably not constitute a waiver of privilege under Evid C §912(a) because the disclosure itself is privileged as a confidential marital communication under Evid C §917. See Jefferson's California Evidence Benchbook §37.9 (4th ed CJA-CEB 2009).

3. Compelled Disclosure

§5.10 a. Effect of Proposition 9

Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), passed by California voters on November 4, 2008, added Cal Const art I, §28(b)(4), which in part provides that victims have a right to prevent disclosure of confidential information or records to the defendant, the defendant's attorney, or any person acting on behalf of the defendant, which "disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law." It appears that Cal Const art I, §28(b)(4) eliminates the ability of the court to compel disclosure of information subject to the domestic violence counselor-victim privilege under Evid C §1037.2(b). See §5.11. However, a defendant might be entitled to the information if a failure to disclose would violate his or her federal due process rights. See *Pennsylvania v Ritchie* (1987) 480 US 39, 56-60, 107 S Ct 989, 94 L Ed 2d 40 (defendant would be denied Fourteenth Amendment due process of law not to have trial judge conduct an in camera review of confidential records to determine whether they are material to guilt or innocence).

§5.11 b. When Court May Order Disclosure

Under the domestic violence counselor-victim privilege, the court may compel disclosure of privileged information received by a domestic violence counselor if it (Evid C §1037.2(b)):

(1) Constitutes relevant evidence of the facts and circumstances of a crime allegedly perpetrated against the victim or another household member;

(2) Is the subject of a criminal proceeding; and

(3) The court determines that the probative value of the information outweighs the effect of disclosure on the victim, on the counseling relationship, and on the counseling services.

The court may also compel disclosure in proceedings relating to child abuse, if it determines that the probative value of the evidence outweighs the effect of the disclosure on the victim, the counseling relationship, and the counseling services. Evid C §1037.2(b).

In addition, the court may compel disclosure if the victim is dead or is not the complaining witness in a criminal action against the perpetrator. Evid C §1037.2(b). When the victim dies, the privilege does not pass to the domestic violence counselor. See Evid C §1037.5(c). However, Evid C §1037.5(b) allows the victim to authorize another person to claim the privilege.

The judge may not require disclosure of information claimed to be within the domestic violence victim-counselor privilege for the purpose of ruling on it under Evid C §915(a), except as noted in §5.13.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.12 c. In Camera Hearing

§5.12 c. In Camera Hearing

When a court rules on a claim of privilege, it may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers or out of the presence and hearing of all persons other than the person authorized to claim the privilege and any other persons he or she consents to have present. Evid C §1037.2(c).

When the court finds that there is a reasonable likelihood that any information is subject to disclosure under the balancing test provided in Evid C §1037.2(b), the court must follow the following procedure (Evid C §§1037.2(d), 1035.4(1)-(3)):

(1) Inform the defendant of the nature of the information subject to disclosure.

(2) Order a hearing outside the presence of the jury, if any.

(3) At the hearing, allow questioning of the domestic violence counselor regarding information that the court has determined may be subject to disclosure.

(4) At the conclusion of the hearing, rule on which items of information, if any, are to be disclosed.

§5.13 d. Disclosure Ordered

If the court determines that information must be disclosed, it must so order and must inform the defendant of its order. Evid C §1037.2(d). When the privileged information at issue is relevant evidence of the facts and circumstances of an alleged crime against the victim or another household member, and is the subject of a criminal proceeding, or is evidence in a proceeding related to child abuse, the court may require disclosure only after it determines that the probative value of the evidence subject to the privilege outweighs the effect of disclosure on the victim, on the counseling relationship, and on the counseling services. See Evid C §1037.2(b). In ordering disclosure in such cases, the court may make an order stating what evidence may be introduced by the defendant and the nature of questions to be permitted. The defendant may then offer evidence in conformity with the court's order. Evid C §§1037.2(d), 1035.4(3).

In determining which parts, if any, of disputed information should be released, the court should protect the confidentiality of the victim's whereabouts when the defendant does not know them. Addresses of shelters and any other addresses of the victim, if not known to the defendant, must also be kept confidential. See Pen C §273.7(a); Fam C §§3100(d), 6323(c).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.14 e. Disclosure Denied

§5.14 e. Disclosure Denied

After applying the balancing test when required under Evid C §1037.2(b), if the court determines that the probative value of the information sought does not outweigh the adverse effect of disclosure, the information is protected from disclosure. If the judge determines that the information is privileged and must not be disclosed, neither the judge nor any other person may disclose information stated in the course of the proceedings in chambers without the consent of a person authorized to permit disclosure. Evid C §1037.2(c).

II. DISCOVERY

§5.15 A. Effect of Proposition 9

Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), passed by California voters on November 4, 2008, added Cal Const art I, §28(b)(4), which in part provides that victims have a right to prevent disclosure of confidential information or records to the defendant, the defendant's attorney, or any person acting on behalf of the defendant, which "disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law." It appears that Cal Const art I, §28(b)(4) eliminates the ability of the court to compel disclosure of information subject to the physician-patient privilege (see §5.19) or the psychotherapist-patient privilege (see §5.21). However, a defendant might be entitled to the information on federal due process grounds (see discussion in §5.10).

§5.16 B. Defendant's Statements to Probation Officer

Evidence Code §1040, which provides public entities with a privilege to refuse to disclose official information, has been held not to apply to statements made by a defendant to his or her probation officer. See *People v Curry* (1950) 97 CA2d 537, 547-548, 218 P2d 153, disapproved on other grounds in 49 C2d 409, 420 (construing predecessor statute, former CCP §1881).

The Fifth Amendment privilege against self-incrimination applies to exclude statements made by defendants to probation officers from evidence, if those statements are compelled and used in a subsequent trial for a crime other than that for which the defendant has been convicted. *Minnesota v Murphy* (1984) 465 US 420, 426, 104 S Ct 1136, 79 L Ed 2d 409. However, the Fifth Amendment privilege against self-incrimination generally is not self-executing; it must be affirmatively asserted by the defendant, except in limited situations involving inherently compelling pressure to speak, such as when the declarant is undergoing custodial interrogation, or when the defendant is threatened with a penalty for exercising the privilege of remaining silent. 465 US at 429-430, 434; *People v Coffman & Marlow* (2004) 34 C4th 1, 117, 17 CR3d 710.

Thus, statements made by a defendant to a probation officer during a presentence investigative interview can be used against the defendant in subsequent criminal proceedings, in the absence of evidence that the statement was compelled, or that the probation officer threatened the defendant with an unfavorable recommendation for refusing to give a statement. 34 C4th at 116-117 (admission during penalty phase of statements made by defendant to probation officer regarding prior guilty plea in robbery case); *People v Goodner* (1992) 7 CA4th 1324, 1330-1332, 9 CR2d 543 (court used defendant's statements to probation officer in probation report to establish defendant's prior conviction for residential burglary for purpose of enhancement under Pen C §667). Statements to a probation officer by a convicted defendant also may be used at a probation revocation hearing, because the role of the trial court at a probation revocation hearing is not to determine whether the probationer is guilty or innocent of a crime but whether he or she can be safely allowed to remain in society. *People v Monette* (1994) 25 CA4th 1572, 1575-1576, 31 CR2d 203. However, on timely objection, the testimony of a probationer at a probation revocation hearing before disposition of criminal charges arising out of the alleged probation violation, and any evidence derived from such testimony, are inadmissible against the probationer in subsequent proceedings on the related criminal charges, except for purposes of impeachment or rebuttal under circumstances indicating that the statements made by the probationer are clearly inconsistent. *People v Coleman* (1975) 13 C3d 867, 889, 120 CR 384.

Statements made by defendant to a probation officer after the defendant pleads guilty are inadmissible as substantive evidence at trial once the guilty plea is withdrawn, when the defendant made the statements to the probation officer only as a result of the plea bargain. *People v Scheller* (2006) 136 CA4th 1143, 1148-1152, 39 CR3d 447. Allowing the prosecution to use such statements as substantive evidence after a defendant withdraws his or her guilty plea violates the Fourteenth Amendment right to due process. 136 CA4th at 1152. In contrast, a defendant's right to due process is not violated by a trial court ruling allowing statements made by the defendant to a probation officer during a presentence interview to be used solely for impeachment purposes at trial, despite the defendant's intervening withdrawal of his or her guilty plea, where the defendant's trial testimony contradicts the earlier statements he or she made to the probation officer. *People v Pacchioli* (1992) 9 CA4th 1331, 1335-1342, 12 CR2d 156.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.17 C. Prior Acts of Violence by Victim

§5.17 C. Prior Acts of Violence by Victim

Under the criminal discovery statutes enacted in 1990 as part of Proposition 115, the Crime Victims Justice Reform Act (see Pen C §§1054-1054.10), no discovery shall occur in criminal cases except as provided by those statutes, as provided by other express statutory provisions, or as mandated by the United States Constitution. Pen C §1054(e). Penal Code §1054.1 governs disclosure of materials by the prosecutor to the defense. Among other things, it requires a prosecuting attorney to disclose to the defendant or to defense counsel the existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial, when such information is in the possession of the prosecutor or the prosecutor knows it to be in the possession of investigating agencies. Pen C §1054.1(d). Such convictions may involve prior acts of violence by a victim if he or she is a material prosecution witness.

Before passage of Proposition 115, California courts permitted discovery of prior acts of violence by a victim of domestic violence in two situations:

(1) When the defendant made a threshold showing that he or she planned to assert a claim of self-defense. See, *e.g.*, *People v Worthy* (1980) 109 CA3d 514, 167 CR 402; *Engstrom v Superior Court* (1971) 20 CA3d 240, 97 CR 484.

(2) When the defendant sought discovery of the existence of pending criminal charges or prior convictions to impeach the victim as a prosecution witness. See, *e.g.*, *People v Coyer* (1983) 142 CA3d 839, 191 CR 376.

In *Engstrom v Superior Court* (1971) 20 CA3d 240, 97 CR 484, disapproved on other grounds in 10 C3d 812, 820, the defendant's former girlfriend asked him to remove his personal belongings from her house. When he arrived, a fight broke out, resulting in one death and gunshot injuries to two others present at the time. The defendant requested various police reports; memoranda; and felony conviction, arrest, and detention records of victims and witnesses to impeach the credibility of the witnesses and victims, and to prove a claim of self-defense. 20 CA3d at 242-243. The court held the felony conviction records of all victims and witnesses discoverable for impeachment purposes. 20 CA3d at 243-245. It refused to order discovery of arrest and other police records of criminal activity for purposes of impeachment, citing Evid C §787. 20 CA3d at 245; but see *People v Wheeler* (1992) 4 C4th 284, 295, 14 CR2d 418 (after passage of Proposition 8, Truth-in-Evidence amendment to former Cal Const art I, §28(d) (now §28(f)(2)), evidence of past misdemeanor conduct bearing on witness's veracity is admissible in criminal proceeding subject to trial court's discretion). Nevertheless, the court concluded that when a defendant offers a claim of self-defense, contending that the alleged victim of the offense was the aggressor, and makes a showing of good cause, the prosecutor must produce information concerning arrests for specific acts of aggression by the alleged victim, if available to the prosecutor. *Engstrom v Superior Court, supra,* 20 CA3d at 245. Compare *People v Worthy*, *supra,* 109 CA3d at 524-525 (trial court properly denied defendant's request for discovery of police reports over six-year period to show victim's propensity for violence toward men with whom she cohabited before marrying defendant, when defendant made no claim of self-defense and had requested all police and sheriff responses to victim's address for any purpose, rather than limiting request to information concerning victim's arrests for specific acts of aggression).

In *People v Coyer, supra,* 142 CA3d at 842-845, the appellate court reversed a trial court's refusal to allow the defendant to discover a list of all criminal charges pending anywhere in the state against witnesses the prosecution expected to call in a rape case. The court found that the pendency of criminal charges is material to a witness's motivation in testifying even when no express "promises of leniency or immunity" have been made. 142 CA3d at 842. Noting that there was no claim that the information was privileged, that a list of charges currently pending against prosecution witnesses could be compiled from information readily available to the district attorney, and that defense counsel lacked a similarly expedient method to obtain the information through his own efforts, the appellate court concluded that the trial judge had abused his discretion in refusing to order the prosecutor to furnish defense counsel with a list of all criminal charges pending against prosecution witnesses. 142 CA3d at 843.

It is unclear whether *Engstrom* and *Coyer* remain viable after passage of Proposition 115, given the limitation in Pen C §1054.1(d) to discovery of felony convictions for material witnesses whose credibility is likely to be critical to the outcome of the trial. See *People v Superior Court* (Barrett) (2000) 80 CA4th 1305, 1312-1313, 96 CR2d 264 (exclusive

nature of discovery scheme under Pen C §§1054 et seq). However, defendants may seek discovery of evidence regarding a prosecution witness's arrests, pending criminal charges, or other such information as exculpatory evidence under Pen C §1054.1(e) or the federal due process clause. See §5.18.

§5.18 D. Exculpatory Evidence Related to Victim

Under Pen C §1054.1(e), a prosecutor must disclose any exculpatory evidence to the defendant or to his or her attorney, if it is in the possession of the prosecuting attorney or the prosecuting attorney knows it to be in the possession of investigating agencies. In addition, the due process clause of the United States Constitution requires the prosecution to divulge all evidence to the defense that is both favorable to the accused and material either to guilt or to punishment. *People v Martinez* (2002) 103 CA4th 1071, 1078, 127 CR2d 305; see *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215. Due process imposes a duty on the prosecution to disclose all substantial material evidence favorable to an accused, regardless of whether the accused makes a discovery request. *Izazaga v Superior Court* (1991) 54 C3d 356, 378, 285 CR 231; *People v Superior Court* (Barrett) (2000) 80 CA4th 1305, 1314, 96 CR2d 264. Such evidence may include information that could impeach prosecution witnesses (*U.S. v Bagley* (1985) 473 US 667, 676, 105 S Ct 3375, 87 L Ed 2d 481; *In re Sassounian* (1995) 9 C4th 535, 544, 37 CR2d 446), such as any current criminal charges pending against them. *People v Martinez, supra,* 103 CA4th at 1078.

In *People v Hayes* (1992) 3 CA4th 1238, 5 CR2d 105, the defendant was convicted of spousal rape, false imprisonment, and attempting to dissuade a victim from prosecuting a crime. The trial court denied defendant's requested discovery of evidence relating to the alleged victim's criminal convictions, pending criminal charges, probation status, acts of dishonesty, and any prior false reports of sex offenses by the victim. 3 CA4th at 1243.

The appellate court found that the requested discovery should have been ordered under Pen C §1054.1(e) and the federal due process clause, because the evidence had a bearing on the victim's credibility. 3 CA4th at 1244-1245. However, the court reversed only the spousal rape conviction, and only to permit the trial court to determine whether the error required a new trial. 3 CA4th at 1245, 1246. The court allowed the other convictions to stand based on a finding of abundant other evidence to support them. *People v Hayes, supra,* 3 CA4th at 1245-1246. The court also held that it was within the trial court's discretion to exclude evidence of the victim's outstanding arrest warrant on prostitution charges as collateral evidence under Evid C §352. 3 CA4th at 1247.

Penal Code §1054.1(e) does not require the prosecution to disclose misdemeanor convictions of prosecution witnesses as exculpatory evidence. *People v Santos* (1994) 30 CA4th 169, 178, 35 CR2d 719. The federal due process clause, however, requires trial courts to allow discovery of a witness's misdemeanor convictions involving moral turpitude, if requested by the defendant, when the evidence reflects on the credibility of a key prosecution witness. 30 CA4th at 178-179 (trial court's error in failing to permit discovery was not reversible). Although the actual record of misdemeanor convictions involving moral turpitude is inadmissible hearsay, disclosing the existence of such convictions assists the defendant in obtaining direct evidence of the misdemeanor misconduct itself. *People v Santos, supra,* 30 CA4th at 179. See also *Currie v Superior Court* (1991) 230 CA3d 83, 95-101, 281 CR 250 (defendant entitled to discover reports concerning pending misdemeanor charge against alleged victim for filing unrelated false report, although belated disclosure by prosecutor did not result in denial of substantial right warranting dismissal of charges against defendant).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.19 E. Medical Records Relating to Victims and Defendants

§5.19 E. Medical Records Relating to Victims and Defendants

The physician-patient privilege does not apply in criminal proceedings. Evid C §998. Any medical records relating to victims or defendants are discoverable in a domestic violence criminal case. But see discussion of Proposition 9 in §5.15.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/ F. Psychotherapeutic Examinations/§5.20 1. Involving Defendant

F. Psychotherapeutic Examinations

§5.20 1. Involving Defendant

Statements made by a defendant to a psychotherapist may be privileged under the statutory psychotherapist-patient privilege. See Evid C §§1010-1027. The psychotherapist-patient privilege applies in both criminal and civil cases. *Story v Superior Court* (2003) 109 CA4th 1007, 1014, 135 CR2d 532. Thus, unlike the physician-patient privilege, there is no automatic exception to the psychotherapist-patient privilege in criminal cases.

Under the psychotherapist-patient privilege, the patient, whether a party or not, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and a psychotherapist. Evid C §§1011, 1012, 1014; *People v Stritzinger* (1983) 34 C3d 505, 511, 194 CR 431; *Story v Superior Court, supra,* 109 CA4th at 1014. For purposes of determining whether a defendant is a patient within the meaning of the psychotherapist-patient privilege statute, it is immaterial that the defendant was motivated to attend psychotherapy as a means to obtain probation and avoid incarceration for a prior offense, when the purpose of defendant's psychotherapy was to treat defendant's emotional problems and thereby aid in his reformation and rehabilitation while on probation. 109 CA4th at 1016-1017. Nevertheless, the psychotherapist-patient privilege is not absolute. 109 CA4th at 1014. There are a number of statutory exceptions to the privilege. See Evid C §§1016-1027. For instance, the privilege does not apply when a defendant is referred to a psychotherapist for court evaluation, unless the court appointed the psychotherapist in a criminal proceeding at the request of the defendant's lawyer to provide the lawyer with information needed to advise the defendant whether to enter or withdraw an insanity plea or to present a defense based on his or her mental condition. Evid C §1017(a). In addition, the privilege is inapplicable concerning the defendant's mental or emotional condition if the defendant places his or her mental or emotional condition in issue, such as by pleading insanity. See Evid C §§1016, 1017; *People v Ledesma* (2006) 39 C4th 641, 690, 47 CR3d 326 (defendant who places mental or emotional condition in issue waives psychotherapist-patient privilege under Evid C §1016, but retains attorney-client privilege when therapist conducted confidential interview of defendant for purpose of assisting defense counsel in preparing and presenting defense, absent waiver of attorney-client privilege or application of exception); see *People v Lines* (1975) 13 C3d 500, 512-514, 119 CR 225 (attorney-client privilege does not have "in issue" or client-litigant exception similar to that of psychotherapist-patient privilege). Similarly, there is no privilege in a proceeding initiated by the defendant to determine the defendant's sanity (Evid C §1023), or in a proceeding brought by or on behalf of the patient-defendant to establish competence (Evid C §1026). There is also no privilege if the psychotherapist has reasonable cause to believe that the patient-defendant is in such mental or emotional condition as to be dangerous to himself or herself, or to the person or property of another, and that disclosure of the communication is necessary to prevent the threatened danger. Evid C §1024. Nor is there a privilege if the patient saw the psychotherapist as part of a plan to commit a crime or to escape detection afterwards. Evid C §1018. Likewise, there is no privilege if the psychotherapist is required to report the information to a public employee or to have it recorded in a public office, if the report or record is open to public inspection. Evid C §1026.

Constitutional privileges may also operate to make information conveyed to a psychotherapist by a defendant inadmissible at trial. The Fifth Amendment privilege against self-incrimination has been held to prohibit the prosecution from using for impeachment purposes at a testifying defendant's criminal trial inconsistent statements the defendant previously made to two mental health professionals during a court-ordered competency hearing. *People v Pokovich* (2006) 39 C4th 1240, 1242-1255, 48 CR3d 158 (trial court erred in admitting evidence, although defendant was not prejudiced by error); see US Const amend V. Although trial courts initiate mental competency hearings, and defendants cannot refuse to undergo a psychiatric examination or waive the right to trial on the issue of mental competency, statements made by a defendant during a competency examination are not compelled and thus are not per se inadmissible; there is no legal sanction against a defendant who refuses to speak to or to cooperate with the court-appointed mental health experts. 39 C4th at 1245, 1249-1251. However, because defendants do not have the benefit of counsel at competency hearings, allowing a defendant's statements during such hearings to be used to impeach the

defendant at his or her criminal trial would create a strong disincentive for defendants to be forthcoming during competency examinations, thus undermining the reliability of competency determinations. 39 C4th at 1251-1252.

A patient-defendant also may be found to have waived the psychotherapist-patient privilege. *Roberts v Superior Court* (1973) 9 C3d 330, 340-341, 107 CR 309; *Menendez v Superior Court* (1992) 3 C4th 435, 448-449, 11 CR2d 92. Waiver of the privilege has been found when the defendant relied on a defense of diminished capacity, at least to the extent of permitting rebuttal testimony regarding the defense by a psychotherapist appointed on request of the prosecution. See *People v Danis* (1973) 31 CA3d 782, 784-786, 107 CR 675 (defendant waived privilege against self-incrimination regarding rebuttal testimony of court-appointed psychiatrist relating to diminished capacity issue; trial court prohibited psychotherapist from testifying regarding any incriminating statements defendant made).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.21 2. Involving Victim or Witness

§5.21 2. Involving Victim or Witness

A frequent issue in a domestic violence case is whether the defendant may discover the victim's psychotherapy records. The use of psychiatric testimony to impeach a witness is generally disfavored. *People v Anderson* (2001) 25 C4th 543, 601, 106 CR2d 575; *People v Marshall* (1996) 13 C4th 799, 835, 55 CR2d 347. Furthermore, Pen C §1112 prohibits courts from requiring a psychiatric examination for the purposes of evaluating a witness's or a victim's credibility in a sexual assault case.

In *People v Reber* (1986) 177 CA3d 523, 223 CR 139, defendants were charged with multiple sexual and other assaults on two victims. The defendant sought pretrial disclosure of the victims' psychotherapy records, asserting that the records would reveal that the victims had histories of paranoid schizophrenia and periods of delusion and hallucination. 177 CA3d at 528-529. Based on the Sixth Amendment right to confrontation and cross-examination of witnesses, and its interpretation of *Davis v Alaska* (1974) 415 US 308, 94 S Ct 1105, 39 L Ed 2d 347, the appellate court concluded that the statutory privilege of confidentiality must give way to pretrial access, when adhering to the privilege would deprive a defendant of the constitutional right of confrontation and cross-examination. *People v Reber, supra,* 177 CA3d at 529-531. Accordingly, the appellate court found that the records were discoverable insofar as defendants had made a good cause showing that they contained evidence of psychotic or hallucinatory behavior relevant to the victim's credibility. 177 CA3d at 531-532. Nevertheless, the appellate court found that the trial court had erred in failing to: (1) obtain and examine in camera all the materials under subpoena; (2) weigh defendants' constitutionally based claim of need against the statutory privilege invoked by the prosecution; (3) determine which privileged matters, if any, are essential to vindicate defendants' rights of confrontation; and (4) create a record adequate to permit review of its ruling. 177 CA3d at 532.

In 1997, the California Supreme Court disapproved *People v Reber* to the extent that it held that the confrontation clause, as interpreted by *Davis v Alaska*, requires pretrial disclosure of privileged information when a defendant's need for information outweighs the patient's interest in confidentiality. *People v Hammon* (1997) 15 C4th 1117, 1123, 65 CR2d 1. The Court clarified that under *Davis*, a criminal defendant has a Sixth Amendment right at trial to cross-examine for bias a crucial witness for the prosecution, even when the questions call for information that is confidential under state law. 15 C4th at 1124; *Davis v Alaska, supra,* 415 US at 315-320. The Sixth Amendment confrontation clause, however, does not extend to requiring court review in camera *before trial* of privileged records from the victim's psychologists to determine whether the records should be disclosed in discovery. *People v Hammon, supra,* 15 C4th at 1127 (emphasis added); see *People v Webb* (1993) 6 C4th 494, 517, 24 CR2d 779 (unclear whether or to what extent Sixth Amendment grants pretrial discovery rights to accused).

When a defendant proposes to impeach a critical prosecution witness at trial with questions calling for disclosure of privileged information, the judge may be called on to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. In contrast, before trial, the court typically does not have sufficient information to conduct this inquiry. Thus, pretrial disclosure creates a serious risk that privileged material will be disclosed unnecessarily. *People v Hammon, supra,* 15 C4th at 1127. Accordingly, such privileged psychiatric material is generally undiscoverable before trial. *People v Gurule* (2002) 28 C4th 557, 593, 123 CR2d 345 (defendant sought pretrial discovery of co-defendant's psychotherapy records).

People v Pack (1988) 201 CA3d 679, 248 CR 240, disapproved on other grounds in 15 C4th 1117, 1123, also dealt with a pretrial motion to discover the victim's records against an assertion of protection by the psychotherapist-patient privilege. Initially, the appellate court held that the trial court should have asserted the psychotherapist-patient privilege on its own motion on behalf of the victim under Evid C §916, when the psychotherapist or agency failed to do so on behalf of the victim. 201 CA3d at 684-685. Acknowledging *People v Reber, supra,* the *Pack* court held that the victim's privileged records were not discoverable because the defendant had failed to make a specific showing of good cause for disclosure. 201 CA3d at 685. The defendant merely asserted that because the victim "apparently received treatment for some mental health problem, the nature of which is unknown" to the defendant, he was therefore entitled to judicial review to determine whether the records contained information sufficiently probative to require disclosure. The court of

appeal disagreed, stating that a person's credibility is not in question merely because he or she receives treatment for a mental health problem. 201 CA3d at 686.

Although the Sixth Amendment confrontation clause may not extend to granting pretrial discovery to the defendant, the defendant may still rely on the federal due process clause in seeking pretrial discovery of psychotherapeutic evidence pertaining to the victim or other key prosecution witnesses. See, *e.g., People v Webb, supra,* 6 C4th at 518. The due process clause requires that the government give the accused all material, exculpatory evidence in its possession, even when the evidence is otherwise subject to a state privacy privilege, at least when there is no clear state policy of absolute confidentiality. 6 C4th at 518, citing *Pennsylvania v Ritchie* (1987) 480 US 39, 56-58, 107 S Ct 989, 94 L Ed 2d 40 (plurality opinion of Powell, J). If the state seeks to protect privileged items from disclosure, the court must examine them in camera to determine whether they are material to guilt or innocence. 480 US at 59; *People v Webb, supra,* 6 C4th at 518. For further discussion of discovery of exculpatory evidence, see §5.18.

III. PROTECTION OF VICTIM'S WHEREABOUTS

§5.22 A. Protection Under Proposition 9

Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), passed by California voters on November 4, 2008, added Cal Const art I, §28(b)(4), which in part provides that victims have a right to prevent disclosure of confidential information or records to the defendant, the defendant's attorney, or any person acting on behalf of the defendant, which "could be used to locate or harass the victim or the victim's family." It appears that Cal Const art I, §28(b)(4) overrides Pen C §§1054.1(a) and 1054.2 to the extent these statutes require the prosecutor to disclose the name and address of the victim if he or she is to be called as a witness at trial (see §5.23). However, a defendant might be entitled to this contact information on federal due process grounds (see discussion in §5.10).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.23 B. Limits on Disclosure

§5.23 B. Limits on Disclosure

As part of the reciprocal discovery provisions of the Penal Code, the prosecuting attorney must disclose to the defendant or to his or her attorney the names and addresses of persons the prosecutor intends to call as witnesses at trial, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies. See Pen C §1054.1(a). However, disclosure of a victim's or witness's address and telephone number is governed by Pen C §1054.2. That section provides that no attorney may disclose or permit to be disclosed to a defendant, to members of the defendant's family, or to anyone else, the address or phone number of a victim or witness whose name is disclosed by the prosecutor under Pen C §1054.1(a), unless the disclosure is specifically permitted by the court after a hearing and showing of good cause. Pen C §1054.2(a)(1).

An attorney may disclose or permit to be disclosed the address or telephone number of a victim or witness to persons employed by the attorney or by the court to assist in preparation of a defendant's case, if disclosure is required for such preparation. However, the attorney must inform persons that are provided with this information that further dissemination of the information, except as provided by Pen C §1054.2, is prohibited. Pen C §1054.2(a)(2). Willful violation of Pen C §1054.2(a) by an attorney, or by persons employed by the attorney or by the court is a misdemeanor. Pen C §1054.2(a)(3). When the defendant acts as his or her own attorney, the court must endeavor to protect the address and telephone number of a victim or witness by providing contact only through a private investigator licensed by the Department of Consumer Affairs and appointed by the court, or by imposing other reasonable restrictions, absent a showing of good cause as determined by the court. Pen C §1054.2(b).

No prosecuting attorney, defense attorney, or investigator for either attorney may interview, question, or speak to a victim or witness whose name has been disclosed by the opposing party under Pen C §1054.1 or §1054.3 without first clearly identifying himself or herself, identifying the full name of the agency with whom he or she is employed, and identifying whether he or she represents, or has been retained by, the prosecution or the defendant. Pen C §1054.8(a). If the interview takes place in person, the party must also show the victim or witness a business card, official badge, or other form of official identification before beginning the interview or questioning. Pen C §1054.8(a). A court may make any lawful order necessary to enforce the provisions of Pen C §1054.8, including contempt proceedings, delaying or prohibiting a witness's testimony or presentation of real evidence, or continuance of the matter. See Pen C §§1054.8(b), 1054.5.

In addition, a trial court has discretion to deny, restrict, or defer disclosure required under the discovery statutes for good cause. Pen C §1054.7. In this context, good cause includes threats or possible danger to the safety of a victim or witness. Pen C §1054.7; *People v Panah* (2005) 35 C4th 395, 458, 25 CR3d 672; *Alvarado v Superior Court* (2000) 23 C4th 1121, 1134, 99 CR2d 149. A trial court's denial of pretrial disclosure of a prosecution witness's identity under circumstances demonstrating such good cause does not violate the defendant's rights under the Sixth Amendment confrontation clause or the Fourteenth Amendment due process clause. 23 C4th at 1134-1136 (trial court had discretion to permit prosecution to withhold pretrial disclosure of names and photos of inmate witnesses who allegedly saw jailhouse murder when prison gang was likely involved; witnesses were vulnerable to threats, coercion, or violence by other inmates; and pretrial preparation of case may extend over long period).

A number of other statutes limit disclosure of a domestic violence victim or witness's name or whereabouts. These include:

(1) Government Code §6254(f)(3) (limiting disclosure of addresses of Pen C §§273.5 and 646.9 victims when requested by victim);

(2) Penal Code §273.7 (punishing as misdemeanor any person who maliciously publishes, disseminates, or otherwise discloses location of trafficking or domestic violence shelter without authorization from shelter);

(3) Penal Code §§293(c), 293.5 (right of sex offense victims to keep name and address confidential from public record);

(4) Penal Code §841.5(a) (unless required by Pen C §§1054 et seq, law enforcement officer or employee must not disclose address or telephone number of victim or witness in alleged offense to any defendant or arrested person).

(5) Family Code §§3100(d), 6323(c) (when party is staying in shelter for domestic violence victims, court must protect party's address and other confidential information in custody and visitation cases).

(6) Family Code §3429(a) (addresses of party alleging domestic violence or child victim of abuse that are unknown to other party are confidential and need not be disclosed in first pleading or affidavit in child custody proceeding).

(7) Family Code §§4926, 4977, 6322.5 (court in family support proceeding may prohibit disclosure of address or other identifying information of party, child, parent, guardian or other caretaker of child to protect health, safety, or liberty of party or child).

(8) Family Code §§6205-6211 (Safe at Home program); see §5.24.

(9) Welfare & Institutions Code §332(e) (petition commencing child dependency proceeding may keep confidential address of parent-victim of domestic violence living separately from batterer-parent).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.24 C. Safe at Home Program

§5.24 C. Safe at Home Program

Under the "Safe at Home" program, persons attempting to escape from domestic violence, sexual assault, or stalking may use an address designated by the Secretary of State as a substitute mailing address and for service of process. See Govt C §§6205-6211. An adult, a parent, or a guardian acting on behalf of a minor or an incapacitated person may apply to have an address designated by the Secretary of State serve as his or her address, or as the address of the minor or incapacitated person. Govt C §6206(a). The purpose of these provisions is to allow state and local agencies to respond to requests for public records without disclosing the changed name or location of a victim of domestic violence, sexual assault, or stalking, and to facilitate cooperation between agencies and the Secretary of State in keeping this information confidential. Govt C §6205.

State and local agencies, when creating or modifying public records, must accept the designated address as a substitute address for a person participating in this program, unless the Secretary of State determines that the agency has a bona fide statutory or administrative requirement for the address that would otherwise be confidential, and that the confidential address will be used only for those statutory and administrative purposes and will not be publicly disseminated. Govt C §6207(a). The Secretary of State may not release a certified participant's confidential address for inspection or copying, except as directed by court order, when requested by a law enforcement agency, or when the participant's certification has been canceled. Govt C §6208. Additional information about the Safe at Home program, which in 2007 included over 2400 people, may be found at http://sos.ca.gov/safeathome/.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.25 IV. CONTINUANCES

§5.25 IV. CONTINUANCES

The court may grant continuances in a criminal case only on a showing of good cause. Pen C §1050(e). To continue any criminal proceeding, the party requesting the continuance must file a written notice, which must be served on all parties to the proceeding at least two court days before the hearing sought to be continued. The notice must be accompanied by affidavits or declarations detailing specific facts showing that a continuance is necessary. Pen C §1050(b)(1).

When deciding whether good cause has been shown for a continuance, the court must consider the convenience and prior commitments of all witnesses. Pen C §1050(g)(1). If the case involves murder, stalking, sexual assault, child abuse, or domestic violence, good cause may be found when the prosecuting attorney has another trial, preliminary hearing, or motion to suppress in progress. See Pen C §1050(g)(2). However, continuances granted on this basis must be limited to a maximum of ten additional court days. Pen C §1050(g)(2). Only one continuance per case may be granted to the prosecution when the case involves stalking. Pen C §1050(g)(3).

Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases, p 36 (Judicial Council of California/AOC, 2008), strongly discourages the use of continuances in domestic violence cases.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.26 V. JURY SELECTION ISSUES

§5.26 V. JURY SELECTION ISSUES

A criminal defendant is constitutionally entitled to trial by a jury drawn from a representative cross-section of the community. See Cal Const art I, §16; US Const amend XIV. Both the United States and California Constitutions prohibit a party from using peremptory challenges to remove prospective jurors solely because they are members of an identifiable racial, religious, or ethnic group. *Batson v Kentucky* (1986) 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69; *People v Wheeler* (1978) 22 C3d 258, 148 CR 890, disapproved on other grounds in 545 US 162, 125 S Ct 2410, 162 L Ed 2d 129. In addition, both the federal and state constitutions prohibit prosecutors from intentionally striking potential jurors on the basis of gender. *J.E.B. v Alabama ex rel T.B.* (1994) 511 US 127, 129, 114 S Ct 1419, 128 L Ed 2d 89; *People v Jurado* (2006) 38 C4th 72, 104, 41 CR3d 319.

In conducting a constitutional review of peremptory strikes, the trial court must follow a three-step inquiry: (1) it must require the defendant to make a prima facie showing that the totality of relevant facts give rise to an inference that the prosecutor exercised a peremptory challenge with a discriminatory purpose; (2) if the court finds that defendant made a prima facie showing, the burden shifts to the state to adequately explain the exclusion by offering a permissible, neutral justification for striking the juror in question; and (3) if the state offers a neutral explanation, the court must then determine whether the defendant has proved purposeful discrimination on an impermissible basis. *Batson v Kentucky, supra,* 476 at 93-94, 96-98; *Johnson v California* (2005) 545 US 162, 168, 125 S Ct 2410, 162 L Ed 2d 129. The United States Supreme Court has rejected California's step-one requirement under *People v Wheeler, supra,* that the defendant make a "more likely than not" showing that the prosecutor's peremptory challenges, if unexplained, were based on impermissible group bias. *Johnson v California, supra,* 545 US at 168-172. Instead, a defendant satisfies the requirements of the first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. 545 US at 170; *People v Johnson* (2006) 38 C4th 1096, 1098-1099, 45 CR3d 1.

In *People v Macioce* (1987) 197 CA3d 262, 242 CR 771, a case involving a battered woman who killed her husband, defendant relied principally on *People v Wheeler* in claiming that the prosecutor used peremptory challenges to systematically exclude women, and particularly "battered women," from the jury. *People v Macioce, supra,* 197 CA3d at 278. The appellate court acknowledged that women are a cognizable group whose representation is essential to a constitutional venire, but rejected the argument that the prosecutor had systematically excluded women, based on the final configuration of the jury of four women and eight men. 197 CA3d at 280. Although the trial court required the prosecutor to explain his use of peremptory challenges excluding women, there is no indication that the appellate court considered those explanations in reviewing the lower court's decision. See 197 CA3d at 278, 280. The appellate court also held that, as crime victims, battered women are not a cognizable group for fair cross-section purposes. The court further found that no showing was made that the viewpoints of battered women could not be adequately represented by women who were not battered and who presumably shared a community attitude against spouse-beaters. 197 CA3d at 280.

The prosecution's exclusion of men from a jury may also deprive a defendant of a jury representing a fair cross-section of the community. See, *e.g.*, *People v Williams* (2000) 78 CA4th 1118, 93 CR2d 356; *People v Cervantes* (1991) 233 CA3d 323, 284 CR 410. In both *Williams* and *Cervantes*, the defendants were convicted of inflicting corporal injury on a spouse and assault with a deadly weapon. On appeal, both defendants argued that the prosecutor had improperly excluded male veniremembers because of their gender. *People v Williams, supra,* 78 CA4th at 1124; *People v Cervantes, supra,* 233 CA3d at 331-332. In *Williams*, the trial court reversibly erred in failing to consider defendant's *Wheeler* motion because it did not believe men to be a cognizable group under state law. *People v Williams, supra,* 78 CA4th at 1124-1126 (remanding for further hearing on *Wheeler* issue). In *Cervantes*, the trial court apparently concluded that defendant had not made a prima facie showing of discriminatory exclusion, but failed to make a clear-cut finding to that effect before asking the prosecutor to respond. *People v Cervantes, supra,* 233 CA3d at 336. The appellate court reversed on the basis of the prosecution's failure to present any reasons for exercising two of the three peremptory challenges. 233 CA3d at 335.

Judicial Tips:

- The Court should consider calling a larger juror panel because many potential jurors, or their family or close friends, may have been victims of or witnesses to domestic violence. Judicial Council of California/AOC, *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases,* p 37 (Judicial Council of California/AOC, 2008).
- The court should inform prospective jurors that the court is willing to conduct part of the voir dire examination in chambers outside the presence of other jurors, so that jurors feel free to reveal potentially embarrassing information. For example, the court can ask any juror who would rather discuss something privately to raise his or her hand. The defendant, his or her counsel, and the prosecutor should be present during the in camera proceeding.

VI. PRESENCE OF VICTIM SUPPORT PERSONS IN COURT

A. Support Persons for Adult Victim

§5.27 1. In Criminal Proceedings

The right of the victim and persons of his or her choosing to be present during criminal proceedings is governed by Pen C §1102.6. Unless the victim is subpoenaed as a witness, he or she is entitled to be present and seated at all criminal proceedings when the defendant, the prosecuting attorney, and the general public are entitled to be present. Pen C §1102.6(a), (d); see Evid C §777 (court may exclude nonparty witnesses from testimony of other witnesses). Penal Code §1102.6 defines "victim" as the alleged victim of the offense, and one person of the victim's choosing, although the court may allow more persons depending on the circumstances surrounding the proceeding. Pen C §1102.6(c)(1). If the victim is unable to attend the proceeding, two persons designated by the victim may attend in the victim's place, or more if allowed by the court. See Pen C §1102.6(c)(2). If the victim is no longer alive, two members of the victim's immediate family may attend the proceeding, or more if permitted by the court. Pen C §1102.6(c)(3).

A victim and his or her support persons may be excluded from a criminal proceeding, but only if all the criteria for exclusion set forth in Pen C §1102.6(b) are met. See Pen C §1102.6(b). The burden is on the party seeking to exclude the victim from the proceeding to establish a substantial probability that "overriding interests" will be prejudiced by the victim's presence. Pen C §1102.6(b)(1). In addition, the court must hold a hearing on the motion to exclude and must afford the victim the right to be heard. Pen C §1102.6(b)(4). The court must consider reasonable alternatives to exclusion (see Pen C §1102.6(b)(2)) and must make specific factual findings supporting exclusion or limiting the victim's presence at the proceeding (see Pen C §1102.6(b)(4)). Any exclusion or limitation must be narrowly tailored to serve the overriding interests identified by the movant. Pen C §1102.6(b)(3). A similar provision governs the exclusion of victims from juvenile proceedings. See Welf & I C §676.5.

Penal Code §1102.6 does not prevent a court from excluding a victim from a criminal proceeding under Evid C §777, when the victim is subpoenaed as a witness. Pen C §1102.6(d). However, the order of exclusion must be consistent with the objectives of Pen C §1102.6(b), to allow the victim, including the support persons permitted by Pen C §1102.6(c), to be present at all proceedings whenever possible. See Pen C §1102.6(d).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.28 2. In Preliminary Hearing and Trial

§5.28 2. In Preliminary Hearing and Trial

In general, preliminary examinations must be open and public. Pen C §868. On request by the defendant, however, the magistrate may exclude the public on finding that exclusion is necessary to protect the defendant's right to a fair and impartial trial. See Pen C §868. Even when the magistrate excludes the public from the preliminary hearing, a person chosen by the prosecuting witness who is not himself or herself a witness, but who is present to provide the prosecuting witness moral support, must be allowed to stay. Pen C §868. In addition, on the prosecution's motion, members of the alleged victim's family may also be allowed to be present during the preliminary hearing. The court must grant the motion unless the magistrate finds that exclusion is necessary to protect the defendant's right to a fair and impartial trial, or unless information provided by the defendant or noticed by the court establishes that there is a reasonable likelihood that attendance by members of the alleged victim's family poses a risk of affecting the content of testimony by the victim or another witness. Pen C §868.

Furthermore, Pen C §868.5 provides that a prosecuting witness in certain specified crimes, including Pen C §§187 (murder), 262 (spousal rape), 273.5 (corporal injury), and 273.6 (violation of protective order), is entitled to the attendance of two support persons of his or her own choosing at the preliminary hearing, and at trial during the prosecuting witness's testimony. See Pen C §868.5(a). One of the support persons may be a witness. One support person may accompany the prosecuting witness to the stand during the witness's testimony, while the other support person remains in the courtroom. Pen C §868.5(a).

If one or both support persons are also witnesses, the prosecution must present evidence that the person's attendance is desired by the prosecuting witness for support, and will be helpful to the prosecuting witness. Pen C §868.5(b). On that showing, the court must grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during testimony by the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. Pen C §868.5(b). The judge must admonish the support person or persons not to prompt, sway, or influence the witness in any way. The court also retains discretion to remove a person from the courtroom if it believes the person is prompting, swaying, or influencing the witness. See Pen C §868.5(b).

A support person who is also a witness must testify before the prosecuting witness. Moreover, the prosecuting witness must be excluded from the courtroom during that testimony. Pen C §868.5(c).

The constitutionality of Pen C §868.5 has been unsuccessfully challenged in several cases. In *People v Patten* (1992) 9 CA4th 1718, 1725-1727, 12 CR2d 284, the adult victim in a forcible rape case requested the presence of two support persons while she testified at trial under Pen C §868.5. The defendant argued that Pen C §868.5 was inherently prejudicial to his right to a fair trial in failing to require a case-specific showing that the support person serve an essential state interest. 9 CA4th at 1726-1727. The appellate court distinguished the procedure available under Pen C §868.5 from cases in which the United States Supreme Court has held that mere use of a witness-protection procedure infringed on a constitutional right, thus requiring a specific finding of necessity based on the victim's need for special protection. 9 CA4th at 1726-1727, citing *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 102 S Ct 2613, 73 L Ed 2d 248 (statute provided for exclusion of press and public when minor victim of certain sex crimes testified), *Coy v Iowa* (1988) 487 US 1012, 108 S Ct 2798, 101 L Ed 2d 857 (statute allowed minor victims to testify by closed-circuit television or behind screen), and *Maryland v Craig* (1990) 497 US 836, 110 S Ct 3157, 111 L Ed 2d 666 (statute permitted child victim of abuse to testify by one-way, closed-circuit television). Noting that Pen C §868.5 encompasses support persons being present in the audience section of the courtroom without having any particular attention drawn to them, the court found that such a procedure results in minimal, if any, influence on a jury and therefore does not rise to the level of possible infringement of the right to due process. *People v Patten, supra,* 9 CA4th at 1727. See also *People v Ybarra* (2008) 166 CA4th 1069, 1076-1079, 83 CR3d 340 (presence of support person during testimony of prosecution witnesses did not violate due process).

In contrast, in *People v Adams* (1993) 19 CA4th 412, 23 CR2d 512, as part of its finding that Pen C §868.5 furthers a compelling state interest in cases involving child victims of sexual abuse and is narrowly tailored, the appellate court

interpreted Pen C §868.5 to require trial courts to hear evidence and to determine the individual need of each prosecuting witness to have support persons present during the witness's testimony. 19 CA4th at 437-444, citing *Coy v Iowa, supra,* 487 US at 1021 (use of statutorily authorized special procedures to protect witnesses must be based on showing of individual witness's need), and *Maryland v Craig, supra,* 497 US at 855-856 (trial court must hear evidence and determine whether use of procedure is necessary to protect welfare of particular witness). In *Adams*, however, the support person, who was the victim's father, was also a witness at trial. There were allegations on appeal that the father had abused the victim, and this may have motivated her to report the crimes as she did. *People v Adams, supra,* 19 CA4th at 425-426.

In affirming a trial court's grant of a prosecution motion under Pen C §868.5 that the nonwitness mother of an 11-year-old victim be allowed to sit beside him when he testified in a child sexual abuse trial, the appellate court in *People v Johns* (1997) 56 CA4th 550, 553-556, 65 CR2d 434, disagreed with *Adams* that a case-specific showing of necessity is required in cases involving nonwitness support persons under Pen C §868.5(a). Citing *Patten*, the *Johns* court noted that the most dangerous aspects of having a support person present at trial are the (1) potential for influencing the jury with a subconscious message that the victim is traumatized and therefore it is more likely the alleged crime occurred, and (2) concern that the presence of a support person may add credibility to the witness's testimony (*i.e.*, the support person "vouches" for the witness's credibility). *People v Johns, supra,* 56 CA4th at 555-556; *People v Patten, supra,* 9 CA4th at 1726-1727. The *Johns* court found both dangers missing in the case before it when the support person did not testify, and the child had stated during cross-examination that he wanted his mother present because he liked her, from which the court deduced that the child was not overly traumatized by testifying. *People v Johns, supra,* 56 CA4th at 555, 556. In addition, there was no showing that the presence of the mother as a support person had actually affected the child's performance and demeanor. 56 CA4th at 555.

§5.29 3. In Interviews or Examinations

A victim of domestic violence or abuse, as defined by Fam C §6203 or §6211 or Pen C §13700, has the right to have a domestic violence advocate and a support person of the victim's choosing present at any interview by law enforcement authorities, prosecutors, or defense attorneys. Pen C §679.05(a). However, the support person may be excluded from an interview by law enforcement or by the prosecutor if the law enforcement authority or the prosecutor determines that the individual's presence would be detrimental to the purpose of the interview. Pen C §679.05(a). Prior to being present at any interview conducted by law enforcement authorities, prosecutors, or defense attorneys, a domestic violence advocate must advise the victim of any applicable limitations on the confidentiality of communications between the victim and the domestic violence advocate. Pen C §679.05(a). For purposes of Pen C §679.05, "domestic violence advocate" means either a person employed by a program specified in Pen C §13835.2 for the purpose of rendering advice or assistance to victims of domestic violence, or a domestic violence counselor, as defined in Evid C §1037.1. Pen C §679.05(a); §§5.2-5.3.

Similarly, victims of specified sexual assault crimes, including spousal rape, are entitled to have victim advocates and a support person of the victim's choosing present at any interview by law enforcement personnel, district attorneys, or defense attorneys. Pen C §679.04(a). If the law enforcement authority or the district attorney determine that the presence of the support person would be detrimental to the purpose of the interview, that person may be excluded from the interview. See Pen C §679.04(a).

Victims of specified sexual assault crimes, including battery on, or corporal injury to, a domestic partner, also may have a sexual assault counselor and a support person of the victim's choice present at any medical evidentiary or physical examination. Pen C §264.2(b)(1). The support person may be excluded from a medical evidentiary or physical examination if the law enforcement officer or the medical provider determines that the person's presence would be detrimental to the purpose of the exam. Pen C §264.2(b)(4).

§5.30 B. Support Persons and Representatives for Children

As with adult prosecuting witnesses, a child witness is entitled to a person of his or her choosing to be present at preliminary hearings to provide moral support, as long as the support person is not a witness. See Pen C §868. In addition, a child who is a prosecution witness in certain specified crimes is entitled to have up to two support persons of his or her own choosing, one of whom may be a witness, at the preliminary hearing and at trial, during the testimony of the prosecuting witness. See Pen C §868.5(a). If the support person or persons chosen are also witnesses, the prosecution must present evidence that the person's attendance is desired by the prosecuting witness for support and will be helpful to the prosecuting witness. Pen C §868.5(b). For further discussion of support persons for adult victims, see §§5.27-5.29.

In recent years, focus on the plight of child victims has produced a variety of rights and innovative court procedures aimed at reducing the stress of the courtroom experience and addressing the mental and emotional needs of the child. Although reform has focused on juvenile and family court procedures and criminal court actions in which the child is the victim, concerns applicable to the child victim are equally relevant when the child is a witness to abuse of a parent. In a domestic violence case, a child testifying to the abuse of one parent by the other may suffer the same anxieties and require the same level of support as a child victim testifying to his or her own abuse by a parent. The court may appoint a representative for a child witness in a domestic violence case under its general enabling authority. CCP §187.

There is no California case addressing the appointment of a representative for a child witness in a domestic violence case. However, there are at least two reported cases from other states authorizing such a procedure when there is evidence that the parents are unable or unwilling to advance the child's best interest. See *State v Freeman* (NJ Super 1985) 496 A2d 1140 (court appointed guardian ad litem for children of defendant who was accused of murdering their mother, when children had been present during mother's last day, and defendant refused to give state permission to interview children); *Stewart v Superior Court* (Ct App 1989) 163 Ariz 227, 787 P2d 126 (although trial court has inherent equitable power to appoint guardian ad litem for nonvictim child witness in criminal case, power is invasive of parents' fundamental interest in the care, custody, and management of their child, and must be exercised only on showing that parents are unable or unwilling to perceive or advance child's best interest). In addition, federal law permits the appointment in federal criminal proceedings of a guardian ad litem for both child victims of physical or sexual abuse, and for child witnesses of such abuse towards others. See 18 USC §3509(a)(2), (h).

In making such an appointment, the court may appoint a person already serving in this capacity in a related case before a juvenile or family court. It has been recommended, however, that standing for a child's attorney in a criminal proceeding be limited to concerns relating to the impact of the court proceedings on the well-being of the child witness. California Child Victim Witness Judicial Advisory Committee, Final Report, p 69 (California Attorney General's Office, October 1988).

The court should also avoid appointing a child representative who is connected with the prosecution or defense. However, this does not prevent prosecution-based victim-witness programs from providing services to child victims and witnesses in any case in which they may be called. Victim-witness personnel are not court-appointed, but are mandated by the California Legislature to provide certain services, such as court support, to adult and minor victims and witnesses. See Pen C §§13835.2-13835.10; see also §5.3.

§5.31 VII. VICTIM TESTIMONY

Victims of violent crime are often reluctant to come to court and testify, regardless of whether the assailant is a stranger, acquaintance, or family member. Reasons for this reluctance differ among individuals. Some common reasons include a desire by victims to put the incident behind them and forget that it occurred; a feeling of shame that perhaps their behavior may have caused the attack in some way; an unwillingness to face the assailant again in the courtroom; fear of the court process and of being put on trial when testifying; fear of retaliation by the defendant; and inability or unwillingness to take time from work to go to court or to arrange necessary childcare.

Additionally, many victims of domestic violence may have difficulty articulating what happened to them as a result of their extreme fear, feelings of helplessness and depression, and possible substance abuse. This contrasts markedly with the often smooth and articulate presentation of the abuser. In addition to the reality-based fear of further violence and lack of economic support necessary to secure protection, domestic violence victims may have inaccurate information regarding the criminal justice process and may be dealing with the confusion that often results from any severe physical trauma.

In some cases, a domestic violence victim's testimony may appear inconsistent with previous statements made by the victim to police, case investigators, or the court. It is not uncommon for a victim of violence to be so traumatized by the incident that it becomes necessary to minimize and deny the level of violence to cope with the resulting psychological pain. This is similar to the minimization and denial seen in hostage victims and survivors of concentration camps. Thus, what might appear to the court as "lying" may be an attempt to survive the psychological and physical trauma of the violence. See *People v Brown* (2001) 96 CA4th Supp 1, 24, 117 CR2d 738 (testimony of Dr. Sandra Baca).

In presiding over a case in which the victim is reluctant or refuses to testify, the court may find it useful to determine the reasons underlying the reluctance or refusal. This assessment may assist the court in determining the best course of action. See §§5.32-5.35.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.32 A. Checklist: Sample Questions When Victim Is Reluctant or Refuses To Testify

§5.32 A. Checklist: Sample Questions When Victim Is Reluctant or Refuses To Testify

The following questions are provided to assist the court in discovering the reasons for a victim's reluctance or refusal to testify, and in ascertaining whether a victim has been coerced or intimidated. Before the court asks these questions in the presence of the abuser, it may be advisable to have a staff person, such as a counselor from victim-witness assistance, ask the same questions of the victim in private. This procedure may help the victim answer the questions more accurately and honestly when he or she gets to the courtroom.

- Would you prefer to talk with me privately in my chambers (see §5.34 for limited purpose of in camera proceedings)?
- Are you aware that you are under oath to tell the truth?
- Are you aware that the People of the State of California are bringing these charges, and that the decision to prosecute the defendant is up to the prosecutor rather than to you?
- (If victim was subpoenaed) Are you aware that the fact that you have been subpoenaed means that the prosecutor decided to call you as a witness, that you must testify, and that you may be held in contempt if you do not do so?
- Why do you feel reluctant (or refuse) to testify?
- When did you become reluctant (or decide to refuse) to testify?
- Were you living with the defendant when the incident happened?
- Are you living with the defendant now?
- (If not) Does the defendant know where you are staying?
- Are you financially dependent on the defendant?
- Do you have children?
- Do you and the defendant have children together?
- Have you discussed the case with the defendant?
- Has the defendant made any promises to do something for you if you do not testify?
- Is that promise to do something the reason you do not wish to proceed or testify?
- Has the defendant or anyone else threatened you or told you not to testify?
- Has the defendant or anyone else threatened your children, family, friends, or anyone else close to you?
- Is there some other reason why you are afraid of the defendant?
- Are you aware that this court can issue an order telling the defendant to stay away from you and have no contact with you or your family?
- Are you aware that if the case is prosecuted, the defendant can be required to get counseling, pay for your damages, and stay away from you and your family?
- (If physical injuries are alleged or visible) How did you receive the injuries (allude to police reports, medical reports, photos, injuries still visible in court, etc.)?
- Have you talked about your desire not to testify with the prosecutor, victim-witness staff, staff of the local domestic violence agency, or anyone else?
- (If not) Would you be willing to talk with the prosecutor, victim-witness staff, or the staff of the local domestic violence agency now?
- Would you like to have a bailiff escort you when you leave today?

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.33 B. Victim's Reluctance or Refusal To Testify: Recommended Practices

§5.33 B. Victim's Reluctance or Refusal To Testify: Recommended Practices

The best method to bring a victim before the court is to issue a subpoena or to order a victim already in court to return on another date. Some judges feel that these procedures should be used in all cases, regardless of the victim's willingness to testify, to reinforce to the defendant that the court, not the victim, controls the proceedings, and that any attempt to manipulate or intimidate the victim will be unavailing. Many victims will testify once ordered to do so by the court. Indeed, they may feel considerable relief at being able to tell the defendant that the decision to testify is out of their hands because they have been ordered to do so by the court.

If the victim appears reluctant to testify, the court should determine the reasons for the reluctance. The checklist in §5.32 can be used to assist the court in determining the reasons for the victim's reluctance.

If the reluctance stems from incomplete or inaccurate information regarding the criminal justice system, fear of the defendant, or a belief that there is no escaping the abusive situation, the court may consider continuing the case for a period of hours or days to permit the victim to obtain information and counseling from the victim-witness program or local domestic violence program. Victim advocates can give accurate information regarding the court process and can help the victim to set up a safety plan. In several courts, judges report that battered women are more willing to cooperate and to testify when they receive information, emotional support, community referrals, and trial preparation from victim advocates. Hart, Barriers to Victim Participation in the Criminal Justice System, Minnesota Center Against Violence and Abuse, 1992.

§5.34 1. In Camera Inquiry

If the victim prefers to talk privately in chambers about his or her reluctance or refusal to testify, such a procedure appears to be authorized under the broad language of CCP §187, which authorizes courts with jurisdiction over a case to adopt any suitable process or mode of proceeding when a course is not specifically provided by code or statute.

In camera inquiries are generally used to determine whether a privilege exists and, if so, whether the defendant's rights outweigh the privilege. See §§5.11-5.12. They have also been used in criminal cases in which a witness expresses or shows fear during testimony. See *People v Avalos* (1984) 37 C3d 216, 232, 207 CR 549 (witness in murder trial who had earlier identified defendant but hesitated when asked to identify him at trial was questioned in camera, then permitted to testify that she was reluctant to testify because of fear); *In re Mary S.* (1986) 186 CA3d 414, 230 CR 726 (children were allowed to testify outside presence of their parents in dependency hearing because they were afraid). In camera proceedings may be utilized to minimize the effects of prejudicial pretrial publicity. *Telegram-Tribune, Inc. v Municipal Court* (1985) 166 CA3d 1072, 1078-1079, 213 CR 7.

The in camera inquiry should be restricted to discussing why the victim is reluctant to testify and whether anything can be done to remedy this, rather than having the victim actually testify on the facts giving rise to the charge or charges.

§5.35 2. Evidentiary Considerations

A witness who is physically available but refuses to testify, after the court has used all reasonable avenues to coerce such testimony, is unavailable, even though the witness does not fit neatly into one of the subdivisions of Evid C §240, which defines when a witness is unavailable. *People v Smith* (2003) 30 C4th 581, 623-624, 134 CR2d 1; *People v Francis* (1988) 200 CA3d 579, 245 CR 923. Thus, previous statements or testimony by that witness may be admissible as exceptions to the hearsay rule, provided the defendant had the opportunity at the time the previous statement was made to cross-examine the witness with an interest and motive similar to that at trial. *People v Smith, supra,* 30 C4th at 624; see §§5.91-5.98.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/ 3. Procedures for Compelling Witness To Attend and Testify/§5.36 a. Subpoena

3. Procedures for Compelling Witness To Attend and Testify

§5.36 a. Subpoena

Victims should generally be subpoenaed to give testimony in court. Most victims will appear as ordered. Nevertheless, there may be cases in which the court will have to issue a bench warrant and require the sheriff to bring the witness before the court to testify. See Pen C §1332 (detention of witness deemed material for trial); Pen C §881 (detention of material witness failing to appear at preliminary hearing). This remedy is not available when the subpoena is served by mail or messenger. See Pen C §1328d.

Before issuing a bench warrant, the court should ascertain whether the victim was personally served with the subpoena. The victim may not have received the subpoena, either because he or she was in hiding, or because the defendant intercepted it. For these reasons, personal service of the subpoena is essential in domestic violence cases. For discussion of bench warrants, see §5.37.

If a child has been subpoenaed to testify, the court may appoint a guardian ad litem to receive service of the subpoena. The guardian must then produce the child in court. Pen C §1328(b)(3).

§5.37 b. Bench Warrant and Undertaking To Appear

When a witness fails to appear at a preliminary hearing in response to a properly served subpoena, the court may hear evidence to determine whether he or she is a material witness. If so, the court must issue a bench warrant for the witness's arrest and may order the witness into custody. Pen C §881(b). A material witness may be held in custody under Pen C §881 for no more than ten days. Pen C §881(d). Within two court days, the witness is entitled to be brought before the magistrate for a review hearing to determine if he or she should be released on security. Pen C §881(c).

A magistrate at a preliminary examination may require each material witness examined by the state to make a written undertaking to appear and testify in the court where depositions and statements in the case are to be sent, or forfeit $500. Pen C §878. When a material witness required to enter into such an undertaking refuses to comply, the magistrate must order the witness to be taken into custody until he or she complies or is legally discharged. See Pen C §881(a). However, if it appears that the witness is unable to procure sureties for such an undertaking, the witness may be conditionally examined by the prosecutor in the defendant's presence, or after notice to a defendant on bail, and then discharged. Pen C §882. In cases other than homicides, the resulting deposition may be used during defendant's trial, subject to the conditions requiring witness unavailability in Pen C §1345. See Pen C §822.

When a court is satisfied, on proof on oath, that there is good cause to believe that any material witness for the prosecution or defense will not appear and testify at trial unless security is required, the court may require the witness to enter into a written undertaking to appear as ordered or to forfeit an amount the court deems proper. Pen C §1332(a).

If a witness required to enter into such an undertaking refuses to comply with the order, the court may have the witness taken into custody until he or she complies or is legally discharged. Pen C §1332(b). Within two days, a detained witness is entitled to an automatic review of an order requiring an undertaking and of an order committing the person, by a judge or magistrate with jurisdiction over the offense other than the one who issued the order. Pen C §1332(c). If the reviewing judge finds that the witness should remain in custody, the witness is entitled to a review of that order after 10 days. Pen C §1332(d).

The court is not required to formally seek a written undertaking from a material witness as a prerequisite to committing the witness in lieu of security under Pen C §1332, nor is the court required to issue a subpoena before detaining the witness. *In re Francisco M., supra,* 86 CA4th at 1072-1074. However, the "proof on oath" language in Pen C §1332(a) clearly contemplates an initial hearing at which the witness is entitled to notice of the basis on which his or her detention is sought. 86 CA4th at 1076. At this hearing, the witness should have counsel, either retained or appointed. *In re Francisco M.* (2001) 86 CA4th 1061, 1072-1074, 103 CR2d 794; *In re D.W.* (2004) 123 CA4th 491, 498-499, 20 CR3d 274. The witness is also entitled to controvert the allegations supporting detention and to be heard and to present evidence on all relevant issues, including whether he or she will agree to return if released, and whether alternatives to incarceration in lieu of security are feasible and adequate. *In re Francisco M., supra,* 86 CA4th at 1076. In deciding whether to order a witness to enter a written undertaking under Pen C §1332(a), the court should consider all relevant circumstances implicated by the interests of the prosecution, the defendant, and the witness. See 86 CA4th at 1076-1079 (listing nonexclusive factors to be considered).

§5.38 c. Avoiding Incarceration of Victim-Witness

In cases in which incarceration of a domestic violence victim-witness would serve only to revictimize the victim, the court may consider adopting internal procedures that enable the witness to be brought directly before the court without having to spend time in jail waiting for the court to reconvene. Continuing the hearing from the morning to the afternoon, or until the following day, may allow time for the witness to be located and brought before the court under its order. It may also be advisable to schedule preliminary hearings for domestic violence cases on the seventh or eighth day after arraignment, rather than on the tenth day, to avoid exceeding the 10-day time limit on holding a preliminary examination. See Pen C §859b.

Courts should view incarceration of a material witness as a last resort. Due diligence does not require that incarceration be sought for every difficult witness. *In re Jesus B.* (1977) 75 CA3d 444, 451-452, 142 CR 197. For example, in *In re Jesus B.*, the victim promised to be available for subsequent hearings, then disappeared. The defendant argued on appeal that the prosecution should have done more to ensure the witness's presence, including incarcerating him as a material witness pending trial under Pen C §§879, 881. The court disagreed, expressing "grave doubt" about the constitutionality of detaining a witness for 18 days, much less two months, in light of Cal Const art I, §10, which precludes unreasonable detention of witnesses. 75 CA3d at 451-452. Nevertheless, the constitutionality of the material witness detention statute has been upheld. See *In re Francisco M.* (2001) 86 CA4th 1061, 1070-1072, 103 CR2d 794 (Pen C §1332 is constitutionally valid on its face under Cal Const art I, §10).

Short of incarceration, the court should consider alternatives to ordering witness detention such as electronic monitoring of the witness, protective custody if the witness's security is threatened, and conditional examination of the witness under Pen C §§1335-1345. 86 CA4th at 1078.

Conditional examination is available to the defense and to the prosecution in non-death penalty cases. See Pen C §1335(a). It is also available to both the defense and prosecution in capital and noncapital cases, when there is evidence that the witness's life is in jeopardy. Pen C §§1335(b), Pen C §1336(b); *People v Jurado* (2006) 38 C4th 72, 110-113, 41 CR3d 319 (reading Pen C §§1335 and 1336 together to permit prosecution in capital case to conditionally examine witness whose life is in jeopardy). Conditional examination is also available to the defense and to the prosecution in domestic violence cases (as defined in Pen C §13700) when there is evidence that a victim or material witness has been or is being dissuaded by the defendant or any person acting on behalf of the defendant, by intimidation or a physical threat, from cooperating with the prosecutor or testifying at trial. Pen C §1335(d), (e).

If the witness is unavailable within the meaning of Evid C §240, the deposition or a video recording of the deposition taken during the conditional examination may be read into evidence during the defendant's trial, subject to the same objections as if the witness were examined in court. Pen C §1345. As long as the defendant has an adequate opportunity for cross-examination at the conditional examination, and the witness is unavailable at trial, use of the witness's prior testimony at trial does not violate defendant's due process or confrontation rights under the federal Constitution. 38 C4th at 115-116; see *Crawford v Washington* (2004) 541 US 36, 55-57, 59, 124 S Ct 1354, 158 L Ed 2d 177 (federal confrontation clause bars admission of "testimonial" statements by witness who does not testify at trial, unless witness is unavailable and defendant had prior opportunity to cross-examine witness). See also *People v Smith* (2003) 30 C4th 581, 621, 623-624, 134 CR2d 1 (fact that domestic violence victim is physically present in courtroom and merely refuses to testify does not preclude finding of unavailability; Evid C §240 does not state exclusive circumstances under which witness may be deemed legally unavailable for purposes of Evid C §1291).

Furthermore, Pen C §1346.1 permits videotaping of the preliminary hearing testimony of a victim of spousal rape (Pen C §262) or corporal injury (Pen C §273.5), on application by the prosecution, and the use of that testimony at trial is otherwise permitted by the Evidence Code. See Pen C §1346.1(a), (d). The statute parallels Pen C §1346, which provides for videotaping the testimony of victims of sexual crimes who are 15 years of age or younger, or who are developmentally disabled.

For further discussion of use of testimony of unavailable witnesses, see §§5.91-5.98.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.39 4. Use of Contempt Power

§5.39 4. Use of Contempt Power

Use of the court's contempt power is another means of ensuring obedience to its orders. The most frequent violations of court orders will be by defendants who fail to appear when ordered, or who violate protective orders issued under Pen C §136.2. On occasion, a witness may fail to appear after being served with a subpoena, or may refuse to be sworn or to answer material questions. A court or magistrate may punish a witness's disobedience of a subpoena or refusal to be sworn or to testify as a contempt. See Pen C §§166(a)(5), (6), 1331, 1326 et seq; CCP §1209(a)(9). Courts also have inherent power to impose contempt in order to police the orderly functioning of their own procedures and processes. See CCP §178.

Refusing to testify may be treated with different responses, depending on the nature of the contempt, the options the court may employ before finding contempt, and other considerations that go into the making of a contempt holding. Before holding a domestic violence victim in contempt for refusal to testify, the court should assess whether a continuance for a reasonable period may have the desired effect of getting the witness to testify. See *People v Sul* (1981) 122 CA3d 355, 359, 365, 175 CR 893 (non-domestic violence case). If the time extends for a lengthy period, the defendant could be given the choice of waiving time or having the court declare the witness unavailable. If the jury is already impaneled, it can be placed on call. 122 CA3d at 366.

A refusal to be sworn or to answer questions is a direct contempt because it is committed in the immediate presence and view of the court or a judge in chambers. See CCP §1211(a). Contempt may be civil or criminal in nature, depending on whether the court's purpose is to coerce (civil) or to punish (criminal). *People v Derner* (1986) 182 CA3d 588, 591-592, 227 CR 344. Even though a contempt may be classified as civil, it is a quasi-criminal proceeding because of the potential penalties. Therefore, many, but not all, of the constitutional rights guaranteed to all criminally accused persons apply to a person charged with either type of contempt. 182 CA3d at 591.

When the contempt is civil, as it would be for refusal to answer questions, a witness may be imprisoned until he or she has performed the specified act. See CCP §1219(a). However, the court may not confine, imprison, or place in custody a victim of a sexual assault or domestic violence crime for contempt for refusing to testify concerning the sexual assault or domestic violence crime. CCP §1219(b). As used in CCP §1219(b), sexual assault includes spousal rape (Pen C §262), and domestic violence is defined by reference to Fam C §6211. CCP §1219(c).

Incarceration of domestic violence victims on a subsequent contempt finding generally should be avoided because it may serve only to revictimize the victim. It should also be noted that a coercive incarceration until the witness complies with a valid court order can present special problems when disobedience is based on an articulated moral principle. In such situations, it is necessary to determine the point at which the commitment ceases to serve its coercive purpose and becomes punitive in character. Incarceration is then limited to the five-day maximum sentence under CCP §1218. *In re Farr* (1974) 36 CA3d 577, 584, 111 CR 649 (reporter refused to disclose source). The test is "the presence or absence of a substantial likelihood that continued commitment will accomplish the purpose of the order." *In re Farr, supra*.

People v Rojas (1975) 15 C3d 540, 125 CR 357, illustrates this point. In *Rojas*, a witness testified as the chief prosecution witness at the preliminary hearing and at the defendant's first trial, but refused to testify at the second trial because of fear of the defendant. At an in camera hearing, the witness testified to receiving threats, being called names, having his property destroyed, and suffering physical assault. Even when told that he would be found in contempt of court, he persisted in refusing to testify and was sent to juvenile hall for the duration of the trial. 15 C3d at 547. In finding the witness unavailable under Evid C §240 and admitting his former trial testimony under Evid C §1291, the appellate court stated, "There was no way in which [the witness] could be compelled to testify. The finding that he was in contempt of court and the punishment therefore could not and did not compel [the witness] to testify." 15 C3d at 552.

The *Rojas* circumstances are similar to some domestic violence cases in which a victim may refuse to testify, or "refuse to remember," because he or she fears the defendant. Even when there are no new threats or assaults between the time of the charged offense and the hearing or trial, a past history of abuse when the defendant feared losing

control over the victim may later cause the victim great fear of retaliation. Thus, in a domestic violence case in which the victim refuses to testify because of fear of the defendant, it would seem that coercive contempt is inappropriate under the test enunciated in *In re Farr*.

The Code of Civil Procedure provides an automatic three-day stay of execution for victims of sexual assault and domestic violence who are found in contempt for failing to testify concerning the alleged assault or violence. This permits the victim to file a petition for extraordinary relief testing the lawfulness of the court's order. CCP §128(d), (e). The stay of execution should allow time for the victim-witness staff to talk to the victim and determine the reason for the reluctance. Victims of domestic violence are often reluctant to testify because they have been given incomplete information regarding the court process and the possible consequences of the criminal case. They may also fear retaliation by the defendant if they testify. Victim advocates can give accurate information regarding the court process and can assist the victim in setting up a safety plan. This enables the victim to assess more realistically the consequences of testifying in light of safety issues.

In addition to giving the witness time to change his or her mind and testify, using procedures such as the three-day stay of execution together with victim-witness services may aptly demonstrate the court's efforts to induce the witness's testimony. In *People v Sul, supra,* 122 CA3d at 367, the trial court committed reversible error when it did nothing directed toward obtaining the witness's testimony other than finding him in contempt and sending him to jail. The court then allowed the witness's prior testimony to be admitted, thereby depriving the defendant of his constitutional right of confrontation. The appellate court held that the trial court should have taken reasonable steps to induce the witness to testify, unless it was obvious that such steps would be unavailing. 122 CA3d at 365-367.

If the witness who has been found in contempt is under 16 years old, which may arise in a teen dating relationship in which there has been domestic violence, the court must refer the matter to the juvenile court probation officer for a report and recommendation before imposing sanctions (CCP §1219.5(a)), unless it enters a finding, supported by specific facts stated in the record, that the minor would be likely to flee if released before receiving the report (CCP §1219.5(c)). It may also be advisable to consider appointing a guardian ad litem for the minor.

The punishment for contempt under Pen C §166(a) for refusing to testify may be a fine up to $1000, six months' imprisonment in a county jail, or both. See Pen C §166(a)(5), (6), 19. Contempt for refusal to testify under CCP §1218 is punishable by a fine up to $1000, or by imprisonment for up to five days, or both, for each separate act of contempt. See CCP §1218(a). However, a witness cannot be convicted of separate acts of contempt for refusing to answer a series of questions relating to an incident he or she witnessed, when the witness makes it clear at the outset that he or she would answer no questions related to that incident. *In re Keller* (1975) 49 CA3d 663, 666-669, 123 CR 223. A person who is found guilty of contempt for violating a court order may be ordered to pay reasonable attorney's fees and costs to the party initiating the contempt proceeding. CCP §1218(a). Note that Fam C §2026, which requires judges in determining contempt to consider the reconciliation of the parties, does not apply in criminal cases.

A trial court's power to compel a witness to attend and testify ends when the proceeding concludes or is otherwise terminated. *In re Lifschutz* (1970) 2 C3d 415, 439 n27, 85 CR 829. Thus, the court has no power to punish the failure to obey a subpoena issued for a case that is no longer pending. *In re McKinney* (1968) 70 C2d 8, 10-13, 73 CR 580. Even if the litigation has been terminated, however, a judge has jurisdiction to vindicate the dignity and authority of the court by punishing a witness for criminal contempt that occurred at an earlier time. *Morelli v Superior Court* (1969) 1 C3d 328, 332, 82 CR 375.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.40 C. Children's Testimony in Domestic Violence Cases: Overview

§5.40 C. Children's Testimony in Domestic Violence Cases: Overview

The decision of whether to allow children's testimony in domestic violence cases raises several issues. On one hand, children are often present during the violence, so their testimony may have great probative value. On the other hand, the child may suffer great trauma from testifying and may be subject to great stress from other family members for "taking sides." Many judges feel that children's testimony in these cases should be used as a last resort.

§5.41 1. Competency

A child's competency to testify as a witness is determined under the general test of Evid C §701(a). That section disqualifies a witness if the person is (Evid C §701(a)):

(1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand the witness; or

(2) Incapable of understanding the duty to tell the truth.

California courts have traditionally held that even very young children can be competent to testify. See *In re Katrina L.* (1988) 200 CA3d 1288, 247 CR 754 (child of four); *People v Mincey* (1992) 2 C4th 408, 443-445, 6 CR2d 822 (child of five); *People v Walker* (1931) 112 CA 146, 147, 296 P 692 (child of five). Another line of cases has held the spontaneous statements of children admissible even when the children were deemed too young to testify. *In re Damon H.* (1985) 165 CA3d 471, 475, 211 CR 623 (two years and nine months old); *People v Orduno* (1978) 80 CA3d 738, 742-743, 145 CR 806 (three years old); *People v Butler* (1967) 249 CA2d 799, 804, 57 CR 798 (ten years old). However, use of spontaneous statements as exceptions to the hearsay rule may be curtailed in light of the United States Supreme Court decision in *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177. See §§5.74, 5.82.

Procedurally, the burden of proof is on the party who challenges a witness's competency to testify. *People v Roberto V.* (2001) 93 CA4th 1350, 1368, 113 CR2d 804; see Evid C §405. The determination of competency is a preliminary fact to be determined exclusively by the trial judge. 93 CA4th at 1368. The issue is not resubmitted to the jury. See 2 Witkin, California Evidence, *Witnesses* §41 (4th ed 2000). In any proceeding outside the presence of the jury, the court may reserve challenges to the competency of a witness until conclusion of the direct examination of that witness. Evid C §701(b).

§5.42 2. Assessing the Credibility of Children's Testimony

Although a ruling of a trial court that a child is a competent witness is conclusive, it is up to the trier of fact to determine the weight it will give a child's testimony. *People v Delaney* (1921) 52 CA 765, 771, 199 P 896. Under present law, no distinction is made between the competence of young children and that of other witnesses. Thus, a child's testimony cannot be deemed insubstantial merely because of his or her youth. *People v Jones* (1990) 51 C3d 294, 315, 270 CR 611; *People v Thomas* (1978) 20 C3d 457, 471, 143 CR 215.

Studies have also undermined traditional notions regarding the unreliability of child witnesses. *People v Jones, supra,* 51 C3d at 315. These studies indicate that child witnesses as young as five years are as reliable as adults. See Foté, *Child Witnesses in Sexual Abuse Criminal Proceedings,* 13 Pepperdine L Rev 157 (1985). On the average, although children tend to recall less than adults, what they do recall is usually quite accurate. Children's errors tend to be those of omission rather than commission. Goodman & Rosenberg, The Child Witness to Family Violence: Clinical and Legal Considerations, chap 7, *Domestic Violence on Trial,* p 106 (New York: Springer Pubs. Co., 1987).

Adoption of this modern view of child witnesses is reflected in the enactment of Pen C §1127f. *People v Jones, supra,* 51 C3d at 315; *People v McCoy* (2005) 133 CA4th 974, 978-979, 35 CR3d 366. Under Pen C §1127f, on request by a party in any criminal proceeding or trial in which a child age 10 or younger testifies as a witness, the court must instruct the jury that in evaluating the testimony of a child witness, it must consider all factors surrounding the child's testimony, including the child's age and any evidence regarding his or her level of cognitive development. The instruction also provides that the fact that a child may perform differently as a witness from an adult does not mean the child is any more or less credible than an adult. Pen C §1127f. Most importantly, it prohibits the jury from discounting or distrusting a child witness's testimony solely because he or she is a child. See Pen C §1127f; CALCRIM 330; CALJIC 2.20.1. The instruction has been upheld as constitutional. 133 CA4th at 978-981; *People v Jones* (1992) 10 CA4th 1566, 1572-1574, 14 CR2d 9; *People v Harlan* (1990) 222 CA3d 439, 455-457, 271 CR 653.

In *People v Boyette* (1988) 201 CA3d 1527, 247 CR 795, a defendant charged with burglary was held to have a right to have the psychotherapeutic records of a five-year-old child witness examined in chambers as part of determining the child's competency and credibility. The appellate court held that the trial court had a duty to determine if the information was privileged, and if so, whether the defendant's right to a fair trial might overcome any privilege, although there was no showing that the child had a history of lying, hallucinating, or exhibiting other traits of "mental instability." However, to the extent this case requires disclosure and review of such evidence before trial, it has been disapproved by *People v Hammon* (1997) 15 C4th 1117, 1123, 65 CR2d 1, discussed in §5.21.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.43 3. Alternative Methods of Taking Evidence

§5.43 3. Alternative Methods of Taking Evidence

In recent years, with the increasing number of trials involving child sexual abuse, courts and legislatures have become increasingly concerned with the danger of retraumatizing children while taking their testimony. Consequently, many states have adopted alternative methods of taking evidence in such cases. These include asking the witness to look somewhere other than at the defendant, using videotaped testimony instead of live testimony, using one-way screens or mirrors, one-way closed-circuit television, two-way closed-circuit television, or simply excluding the defendant from the courtroom or from an in camera hearing. See Myers, Child Witness Law and Practice, pp 383-432 (Wiley, 1987). See also *Coy v Iowa* (1988) 487 US 1012, 108 S Ct 2798, 101 L Ed 2d 857, discussed below.

Pre-1982 California cases held that procedures that denied defendant the opportunity to view the testifying minor witness violated the Sixth Amendment. See *Herbert v Superior Court* (1981) 117 CA3d 661, 172 CR 850 (defendant seated so he could hear but not see five-year-old prosecuting witness at preliminary hearing in prosecution for lewd acts on child). Beginning in 1982, the California Legislature enacted laws providing alternative means of taking testimony from child victims in selected criminal cases. See Pen C §§1346, 1347-1347.5.

Penal Code §1347 provides for the use of closed-circuit television in sexual offense or violent felony cases where a minor, aged 13 or younger, is the victim, if the court finds clear and convincing evidence that the impact of testifying would be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used. See Pen C §1347(b)(1), (2). The statute describes in detail the procedure to be followed when closed-circuit television is allowed, including the use of a support person for the minor and a nonuniformed bailiff. See Pen C §1347(e)-(g). In enacting Pen C §1347, the Legislature declared its intent to provide courts with discretion to employ alternative court procedures to protect child witnesses. See Pen C §1347(a). However, the statute cautions that in exercising its discretion, trial courts must balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. Such discretion is "to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these alternative procedures." Pen C §1347(a).

The United States Supreme Court addressed this issue in *Coy v Iowa, supra,* which held that an Iowa statute violated the defendant's Sixth Amendment right of confrontation in authorizing the use of closed-circuit TV or a one-way screen in all child sexual abuse cases. In *Coy*, a large screen had been placed between the witnesses and the defendant, enabling defendant to see the witnesses dimly, while the witnesses could not see defendant at all. *Coy v Iowa, supra,* 487 US at 1014-1015, 1020. The Court stated that the confrontation clause provides criminal defendants the right to physically face witnesses giving evidence against them at trial, and that such confrontation helps ensure the integrity of the fact-finding process. 487 US at 1017-1020. Although it acknowledged that confrontation clause rights are not absolute and may give way to other important interests, the Court did not decide the scope of such exceptions beyond suggesting that they would be allowed only when necessary to further an important public policy, and when there have been individualized findings that a particular witness needs special protection. 487 US at 1020-1021; see 487 US at 1025 (O'Connor and White, J, concurring) (citing prior version of Pen C §1347 with approval, pointing out that it, unlike Iowa statute, requires trial court to make specific findings of necessity; current Pen C §1347(b) also contains this requirement).

In *Maryland v Craig* (1990) 497 US 836, 110 S Ct 3157, 111 L Ed 2d 666, the U.S. Supreme Court upheld the use of procedures allowing something less than literal face-to-face confrontation between the defendant and a child victim in a sexual molestation case. The Court concluded that a state's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of procedures permitting child witnesses to testify at trial against defendants in the absence of face-to-face confrontation, providing the state makes an adequate, case-specific showing of necessity. 497 US at 853, 855-856. The Court established a two-part test for alternative procedures to pass constitutional muster: (1) the procedure must be necessary in a given case to protect a child witness from emotional trauma caused by testifying in front of the defendant that would impair the child's ability to communicate; and (2) the reliability of the testimony must be otherwise ensured by rigorous adversarial testing. See 497

US at 855-857. In this case, the child's testimony was offered through one-way closed-circuit television.

There are few California cases on this issue. The court in *People v Sharp* (1994) 29 CA4th 1772, 36 CR2d 117, disapproved on other grounds in 11 C4th 434, 452, held that questioning a child witness with the child looking away from the defendant, but seated in a manner that allowed defendant to watch the child give her testimony with only a portion of her face limited from view, does not deprive the defendant of his right to face-to-face confrontation. The court applied the two-part test established in *Maryland v Craig, supra,* in concluding that allowing the child to look away while testifying in court minimized the resulting emotional trauma and caused only a minor interference with the defendant's right to face-to-face confrontation. *People v Sharp, supra,* 29 CA4th at 1782-1783. *Sharp* distinguished *Herbert v Superior Court, supra*, noting that in that case, the courtroom was arranged so it was physically impossible for the defendant and witness to see each other during the child's testimony. *People v Sharp, supra,* 29 CA4th at 1781, citing *Herbert v Superior Court, supra,* 117 CA3d at 664-665 n1. *Sharp* also questions the precedential value of *Herbert*, since it was decided before *Maryland v Craig* held that a trial court may employ procedures allowing something less than literal face-to-face confrontation between an adult defendant and his or her child victims in a sexual molestation prosecution. *People v Sharp, supra,* 29 CA4th at 1782-1783.

In *People v Murphy* (2003) 107 CA4th 1150, 132 CR2d 688, use of a one-way glass during an adult victim's testimony in an oral copulation by force and false imprisonment trial was held to violate defendant's Sixth Amendment right to confrontation. However, in *Murphy*, the trial court consented to the prosecution's request to use the one-way glass without holding an evidentiary hearing to determine whether and to what degree the victim's apparent anxiety was due to the defendant's presence rather than to some other cause. 107 CA4th at 1157-1158. The appellate court found that the trial court's ruling was not based on an adequate "case-specific finding of necessity" as required by *Maryland v Craig*. 107 CA4th at 1158.

In *In re Amber S.* (1993) 15 CA4th 1260, 19 CR2d 404, the appellate court held that the juvenile court had inherent power to use one-way closed-circuit television to take the testimony of minors outside the presence of their parents in a juvenile dependency proceeding.

§5.44 4. Other Methods for Protecting Child Witnesses

The presence of a support person for the child witness may have the single greatest effect in creating a nonthreatening environment for the child. See Pen C §§868, 868.5. Penal Code §868.5 permits a prosecuting witness in certain specified crimes to have up to two support persons of his or her own choosing at the preliminary hearing and at trial during the prosecuting witness's testimony. Pen C §868.5(a); for further discussion, see §5.30.

A magistrate is also empowered, on prosecution motion, to close a preliminary examination during the testimony of a child who is the complaining victim in a sex offense, when testimony before the general public would likely cause serious psychological harm to the witness, and there are no alternative procedures available to avoid the perceived harm. Pen C §868.7(a)(1); see also Pen C §859.1 (court may close courtroom to protect reputation of minor victim in sexual and other specified cases). However, Pen C §868.7 applies only to preliminary hearings. *People v Baldwin* (2006) 142 CA4th 1416, 1422, 48 CR3d 792. A trial court may limit public access to a trial or other criminal proceeding only on a showing that (1) an overriding interest is likely to be prejudiced if the proceeding is left open; (2) the closure will be no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court articulates the interest protected and makes specific findings sufficient for a reviewing court to determine whether closure was proper. *Waller v Georgia* (1984) 467 US 39, 45, 48, 104 S Ct 2210, 81 L Ed 2d 31; *People v Baldwin, supra,* 142 CA4th at 1421 (trial court violated defendant's Sixth Amendment right to public trial by closing courtroom to spectators during trial testimony of 14-year-old molestation victim based only on prosecutor's assertion that victim would have difficulty testifying).

In criminal proceedings in which the defendant is charged with a domestic violence crime as defined in Pen C §13700, or with other specified crimes committed with or on a child under 11, the court must take special precautions to provide for the comfort and support of the child, and to protect the child from coercion, intimidation, or undue influence as a witness. Pen C §868.8. Such precautions include, but are not limited to, granting frequent recesses; removing the judge's robe if it appears to intimidate the witness; relocating the judge, parties, witnesses, support people, and court personnel within the courtroom to facilitate a more comfortable and personal environment for the child; and taking the testimony of the child during normal school hours. See Pen C §868.8(a)-(d). This statute suggests discretionary judicial acts that would equally apply to examining a child witness in cases not expressly included within its provisions.

Continuances can cause significant distress to child witnesses. The court can prevent the child from being further traumatized by avoiding unnecessary continuances. See Goodman & Rosenberg, The Child Witness to Family Violence: Clinical and Legal Considerations, ch 7, *Domestic Violence on Trial,* pp 97-126 (New York: Springer Pubs. Co., 1987).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.45 5. Court Orders To Protect Child From Influence

§5.45 5. Court Orders To Protect Child From Influence

Various types of court orders can be issued to protect child witnesses from influence. Stay-away orders, including no-contact orders under Pen C §136.2, are available when there is a showing of a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. See Pen C §136.2(a); §3.9. Such an order may be appropriate in protecting the child witness from being influenced by the defendant. In cases involving certain sexual abuse or domestic violence crimes committed with or on a minor under age 11, the court is also empowered to take special precautions to protect the minor from coercion, intimidation, or undue influence as a witness. Pen C §868.8; see §5.44.

Additionally, courts appear to have authority to issue orders protecting children from influence from either the defendant or from the complaining witness under CCP §§128(a)(5) and 187. Code of Civil Procedure §128(a)(5) provides that every court has the power to control the conduct of persons connected with a judicial proceeding before it in any matter pertaining to that proceeding. Under CCP §187, a court or judicial officer with jurisdiction over a case has all the means necessary to exercise that jurisdiction. If, in exercising that jurisdiction, a course of proceeding is not specifically indicated in the Code of Civil Procedure or other statute, the court may adopt any suitable process or mode of proceeding that most conforms to the spirit of the Code of Civil Procedure. CCP §187.

§5.46 D. Assessing the Credibility of Victim's Testimony

Evidence Code §780 provides that in determining a witness's credibility, the court or jury may consider any matter that has a tendency in reason to prove or disprove the truthfulness of the witness's testimony, including the matters listed in the statute. See Evid C §780(a)-(k). In *People v Collie* (1981) 30 C3d 43, 177 CR 458, the case turned on the credibility of the victim versus the credibility of a defense witness. Defendant was convicted of attempted first-degree murder and forcible sodomy of his wife and attempted second-degree murder of his daughter. Defendant's girlfriend, who provided an alibi, testified to the victim's extreme jealousy regarding defendant's associations with other women. The court held that although this could have raised questions in the jurors' minds regarding the victim's truthfulness and motive in assisting the prosecution, it could also have provided an explanation for the defendant's alleged hostility to his wife. 30 C3d at 58. The victim's eyewitness testimony was corroborated by neighbors and police officers. The appellate court upheld the verdict. See also *People v Fatone* (1985) 165 CA3d 1164, 211 CR 288, in which the court held that exclusion of credibility evidence concerning the victim was error.

Special issues may arise regarding victim-witness credibility in domestic violence cases. For example, when the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim earlier told the police, the court or jurors may assume that the victim is not a truthful or reliable witness. Similarly, if the victim's trial testimony supports the defendant or minimizes the violence of his or her actions, the court or jury may assume that the victim would not be testifying in defendant's favor if the defendant really had been abusive. These are commonly held notions about domestic violence victims. *People v Brown* (2004) 33 C4th 892, 906-907, 16 CR3d 447. In cases presenting such circumstances, admitting expert testimony may be necessary to explain the behavior of the victim-witness. For discussion of expert testimony, see §§5.47-5.59.

VIII. EXPERT TESTIMONY IN DOMESTIC VIOLENCE CASES

§5.47 A. Expert Testimony Offered by Prosecution

The U.S. Attorney General's Task Force on Family Violence, Final Report, *Recommendations for Judges*, p 42 (Washington D.C.: U.S. Department of Justice, 1984) recommends that courts permit expert testimony on the effects of intimate partner battering to provide the judge and jury with a clear understanding of the dynamics and complexities of family violence. "Cognizant of the cyclical nature of violence within the family, the emotional, economic, and psychological dependencies between the victim and abuser, and other fundamental aspects of abuse, [judges and jurors] will be better able to understand the victim's actions." The California Supreme Court has upheld the use of such testimony in domestic violence criminal cases, both when offered by the prosecution (*People v Brown* (2004) 33 C4th 892, 16 CR3d 447), and when offered by the defense (*People v Humphrey* (1996) 13 C4th 1073, 56 CR2d 142).

The specific characteristics and effects of abuse on battered partners have traditionally been called battered women's syndrome (BWS). The preferred term among many experts today is "expert testimony on battering and its effects" (*People v Humphrey*, *supra*, 13 C4th at 1083 n3, (cataloguing other potential issues with use of BWS terminology)), or "evidence of the effects of intimate partner battering," as it is currently referenced in the California Evidence Code (see Evid C §1107(a)). See also *People v Brown, supra*, 33 C4th at 899-900 (summarizing critiques of BWS). Intimate partner battering may result in a victim's decreased ability to respond effectively to the violence. Victims may appear traumatized, withdrawn, and nonresponsive. Conversely, they may appear articulate, or even angry. They may suffer from lowered self-esteem and may have developed coping behaviors to increase their personal safety, including minimizing or denying the danger they have endured. At times, they may rely on alcohol or drugs to cope with the severity of the violence. Producing testimony that addresses these characteristics may be of considerable assistance to the trier of fact. Of course, even if no expert testimony is presented, it is incumbent on the court to be aware of these dynamics, because they are present in many domestic violence cases.

§5.48 1. Evidence Code §1107

Under Evidence Code §1107, expert testimony on intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, is admissible in criminal actions. This testimony may be offered by either the prosecution or defense. See Evid C §1107(a). Such evidence, however, may not be offered against a defendant to prove the occurrence of the act or acts of abuse that form the basis of the criminal charge. Evid C §1107(a).

For purposes of Evid C §1107, "abuse" is defined by referencing Fam C §6203; "domestic violence" is defined by referencing Fam C §6211 and also by additional specified crimes including spousal rape (Pen C §262), corporal injury (Pen C §273.5), and criminal threats (Pen C §422). See Evid C §1107(c).

To lay a proper foundation for introducing expert witness testimony on intimate partner battering, the proponent of the testimony must establish its relevancy and the proper qualifications of the expert witness. Evid C §1107(b). Expert opinion testimony on intimate partner battering and its effects must not be considered a new scientific technique whose reliability is unproven. Evid C §1107(b). This provision thus negates the need to determine in each case whether such testimony has been accepted in the scientific community as required by the *Kelly* rule, as long as the evidence is properly offered under Evid C §1107. See *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; for discussion of *Kelly* rule, see §5.50.

Accordingly, under Evid C §1107, a properly qualified expert may testify to the effects of intimate partner battering when it is relevant to a contested issue at trial other than whether a criminal defendant committed charged acts of domestic violence. *People v Humphrey, supra,* 13 C4th at 1076; *People v Gadlin* (2000) 78 CA4th 587, 592, 92 CR2d 890. There are two major components to a relevance analysis in this context. First, there must be sufficient evidence in the particular case to support a contention that the victim has been affected by intimate partner battering. Second, there must be a contested issue as to which the testimony is probative. See *People v Gadlin, supra,* 78 CA4th at 592 (using BWS terminology). Even when the evidence indicates only a single violent incident, testimony concerning the effects of intimate partner battering is relevant and may be admitted. *People v Williams* (2000) 78 CA4th 1118, 1129-1130, 93 CR2d 356; see *People v Brown* (2004) 33 C4th 892, 904-905, 908, 16 CR3d 447 (holding such evidence admissible in that case under Evid C §801).

Testimony regarding the effects of intimate partner battering has been deemed relevant in murder cases involving self-defense on the question of whether the defendant actually believed it was necessary to kill in self-defense, and also on the question of the objective reasonableness of that belief. See, *e.g*., *People v Humphrey* (1996) 13 C4th 1073, 1076-1077, 1081-1087, 56 CR2d 142. Such testimony has also been deemed relevant to the victim's credibility as a witness by helping to explain why victims of domestic violence may stay in a battering relationship, why they may recant prior statements or testimony about the events at issue, or why they may deny or minimize the defendant's conduct. See, *e.g.*, 13 C4th at 1087; *People v Williams* (2000) 78 CA4th 1118, 1127-1128, 93 CR2d 356; see §5.57.

In cases involving violent felonies, as specified in Pen C §667.5(c), committed before August 29, 1996, exclusion of evidence relating to intimate partner battering and its effects within the meaning of Evid C §1107 may constitute grounds for habeas corpus relief. Pen C §1473.5(a), (b); *In re Walker* (2007) 147 CA4th 533, 54 CR3d 411 (in granting Pen C §1473.5 petition for writ of habeas corpus, court vacated second-degree murder conviction and remanded for new trial; court found a reasonable probability that, if presented with expert testimony of intimate partner battering and its effects, the jury would have found defendant guilty of the lesser offense of voluntary manslaughter).

§5.49 2. Evidence Code §801

Expert testimony regarding the effects of intimate partner battering may also be admissible under Evid C §801. *People v Brown* (2004) 33 C4th 892, 895-896, 905, 907, 16 CR3d 1447. Under that provision, expert testimony is admissible on any subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Evid C §801(a); 33 C4th at 907.

People v McAlpin (1991) 53 C3d 1289, 283 CR 382, tested the admissibility of expert testimony under Evid C §801 in a child molestation case. In *McAlpin*, the trial court permitted a police officer with extensive training and experience in child molestation investigations to testify that it was not unusual for a parent not to report a child molestation until confronted by a law enforcement agency. The officer also testified that there is no profile of a "typical" child molester. 53 C3d at 1298-1299. The defendant argued that the expert's testimony did not meet the test of Evid C §801(a) because it was not sufficiently beyond common experience that it would assist the trier of fact. 53 C3d at 1299. The Supreme Court disagreed, holding that the jury need not be "wholly ignorant" of the subject matter of an opinion to justify its admission. Such evidence may be excluded only if it would add nothing to the jury's common fund of information, *i.e.*, when the subject of inquiry is one of such common knowledge that persons of ordinary education could reach a conclusion as intelligently as the witness. 53 C3d at 1300-1302.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.50 3. Kelly Considerations

§5.50 3. *Kelly* Considerations

In the absence of specific legislation such as Evid C §1107 (see §5.48), the *Kelly* test regarding the standard of reliability for new scientific methods of proof may govern admissibility of expert testimony concerning a new scientific technique. See *People v Kelly* (1976) 17 C3d 24, 130 CR 144. Under *Kelly*, evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The test requires proof that (1) the technique is generally accepted as reliable in the relevant scientific community; (2) the witness testifying about the technique and its application is a properly qualified expert on the subject; and (3) the person performing the test in the particular case used correct scientific procedures. 17 C3d at 30, 32. Once a published appellate decision affirms a trial court ruling admitting evidence obtained by a particular scientific technique, proof of the technique's general acceptance in the relevant scientific community is no longer necessary, unless new evidence is presented reflecting a change in the attitude of the scientific community. 17 C3d at 32.

Until 1993, this test was generally known in California as the *Kelly-Frye* rule, since *Kelly* relied on the reasoning of *Frye v United States* (DC Cir 1923) 293 F 1013. In 1993, the United States Supreme Court held that the Federal Rules of Evidence had superseded *Frye*. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 587, 113 S Ct 2786, 125 L Ed 2d 469. However, the *Kelly-Frye* rule remains the law in California. See *People v Leahy* (1994) 8 C4th 587, 604, 34 CR2d 663. It is currently referred to as the *Kelly* test or rule. *People v Soto* (1999) 21 C4th 512, 515 n3, 88 CR2d 34.

The *Kelly* test applies to only a limited class of expert testimony based in whole or in part on a technique, process, or theory that is new to science and to the law. *People v Leahy, supra,* 8 C4th at 605; *People v Stoll* (1989) 49 C3d 1136, 1156, 265 CR 111. Because of the potential breadth of the term "scientific" in the *Kelly* doctrine, the courts often refer to the purpose of the test: to protect the jury from techniques that convey a "misleading aura of certainty." *People v Leahy, supra,* 8 C4th at 605; *People v Stoll, supra,* 49 C3d at 1155-1156. A technique may be deemed "scientific" for purposes of the *Kelly* test if "the unproven technique or procedure appears in both name and description to provide some definitive truth that the expert need only accurately recognize and relay to the jury." *People v Leahy, supra,* 8 C4th at 606; *People v Stoll, supra,* 49 C3d at 1156.

Thus, the *Kelly* test may apply depending on the technique used by the expert witness, and on the purpose for which the expert's testimony is offered. For example, in *In re Amber B.* (1987) 191 CA3d 682, 236 CR 623, a juvenile dependency case, the practice of detecting child sexual abuse by observing a child's behavior with anatomically correct dolls and analyzing the child's reports of abuse was held to be a new scientific process subject to the *Kelly* test, when the psychologist testified at trial that the victim in the case had actually been sexually molested, and that she believed the molester was her father. 191 CA3d at 691.

In *People v Bledsoe* (1984) 36 C3d 236, 203 CR 450, the court held that expert testimony on rape trauma syndrome is inadmissible to prove that the victim in the case was raped, because the syndrome was devised as a therapeutic tool rather than a method to determine the truth or accuracy of a particular or past event. 36 C3d at 249-251. The *Bledsoe* court emphasized that this conclusion was not intended to suggest that rape trauma syndrome is not generally recognized or used in the general scientific community, but only that it is not relied on in that community for the purpose for which the prosecution sought to use it in the case: to prove that a rape in fact occurred. 36 C3d at 251. But see *People v Stoll, supra,* 49 C3d at 1161 (*Bledsoe* did not explicitly hold *Kelly* test applicable to expert opinion in that case, nor did it discuss test's relationship to syndrome or other expert psychological evidence in general). The *Bledsoe* court also acknowledged that expert testimony "may play a particularly useful role by advising the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." *People v Bledsoe, supra*, 36 C3d at 247.

In *People v Roscoe* (1985) 168 CA3d 1093, 1097-1098, 215 CR 45, another child molestation case, the trial court was found to have erred in allowing a psychologist to testify that the prosecuting witness was a victim of child sexual abuse. However, the appellate court, relying on *Bledsoe,* found that expert testimony confined to a discussion of victims as a class, which does not extend to discussion and diagnosis of the particular victim-witness, is admissible in rebuttal

to rehabilitate a victim's credibility. 168 CA3d at 1099-1100. See also *People v Gray* (1986) 187 CA3d 213, 231 CR 658 (*Kelly* test did not apply to psychologist's testimony on child abuse accommodation syndrome in child molestation case, when testimony was offered to explain reluctance of molestation victims as class to talk with investigators, not to prove that molestation had occurred in that case). The *Roscoe* court reasoned that if the expert were allowed to base his or her opinion and diagnosis on the particular victim in the case, the jury in effect would be asked to believe the diagnosis, to agree that the expert's analysis was correct, and therefore to conclude that the defendant was guilty. *People v Roscoe, supra*, 168 CA3d at 1100.

§5.51 4. Qualifications of Expert

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify as an expert on the subject to which his or her testimony relates. Evid C §720(a). Whether a person qualifies as an expert in a particular case depends on the facts of that case and on the witness's qualifications. *People v Kelly* (1976) 17 C3d 24, 39, 130 CR 144. Thus, in *People v Brown* (2001) 96 CA4th Supp 1, 37, 117 CR2d 738, the fact that the testifying professional was a licensed marriage and family counselor rather than a licensed clinical psychologist did not prevent her from qualifying as an expert on the effects of intimate partner battering, when the counselor had over a decade of experience dealing exclusively with domestic violence, had actively participated in four domestic violence organizations, and had prior direct contact with over 2600 victims of domestic violence.

Similarly, although experts in many cases are psychotherapists or other professionals, professional credentials are not a necessary precondition to qualification as an expert. For example, in *People v McAlpin* (1991) 53 C3d 1289, 1298, 283 CR 382, a police officer who had many years of experience working as an investigator in the area of child sexual abuse qualified as an expert on that subject. In an area such as domestic violence, people who have worked for many years in battered victim's programs may also qualify as experts. See Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women,* 2 S Cal Rev of Law & Women's Studies 219, 229 (1992).

§5.52 5. Testimony on Effects of Battering To Explain Witness's Reluctance To Testify

There are many reasons why a victim of domestic violence may be reluctant to testify. Most victims of violent crimes other than domestic violence do not live with their assailant. Frequently, the domestic violence victim may be subjected to threats, intimidation, or constant pleading by the batterer not to testify against him or her. Batterers' threats and intimidation are often carried out, especially after the victim leaves.

As stated in Hart, Barriers to Victim Participation in the Criminal Justice System (Minnesota Center Against Violence and Abuse, 1992):

> Prosecutors too often believe that battered women will be safer and less exposed to life-jeopardizing violence once they are separated from the offender; once prosecution has commenced. Quite to the contrary, evidence of the gravity of violence inflicted after separation of the couple is substantial. Batterers may, in fact, escalate their violence to coerce a battered woman into "reconciliation," to retaliate for the battered woman's participation in the prosecution process, or to coerce her into seeking termination of the prosecution. If the batterer cannot "recapture" the battered woman as his ally, he may seek retribution for her desertion and for her disloyalty in exposing him to criminal consequences. Although not all batterers engage in escalated violence during the pendency of prosecution, as many as half threaten retaliatory violence (Davis, R., Smith, B., Henley, S. (1990). Victim-Witness Intimidation in the Bronx Courts. New York, NY: Victims Services Agency) and at least 30% of batterers may inflict further assaults during the pre-disposition phase of prosecution (Goldsmith, S. (1991), Taking Spouse Abuse Beyond a Family Affair, Law Enforcement News, Vol. XVII, No. 334).

Additionally, the victims' desire to protect themselves from further assaults may be complicated by their concurrent desire to remain in the relationship. They may feel responsible for keeping the family together or may be financially dependent on the batterer.

Expert testimony on the effects of intimate partner battering may be admissible in domestic violence cases under Evid C §1107 when the battered partner is reluctant or refuses to testify, and to rehabilitate a victim-witness who may have denied the abuse in the past or at trial. See Evid C §1107(a). Such testimony may also be admissible under Evid C §801. *People v Brown* (2004) 33 C4th 892, 904-907, 16 CR3d 447; see §5.49.

Specifically, expert testimony on the effects of intimate partner battering has been admitted to explain why the victim may recant or minimize earlier descriptions of the alleged violence against them and to restore their credibility as witnesses. See, *e.g.*, *People v Brown, supra,* 33 C4th at 895-897, 906-907; *People v Morgan* (1997) 58 CA4th 1210, 1214-1217, 68 CR2d 772. Expert testimony on the effects of battering is also admissible to explain a victim's reunion with the defendant after an incident of abuse, even when the victim cooperated with the prosecution at trial, because the attack on the victim's credibility is based on his or her state of mind at the time of the incidents at issue. *People v Gadlin* (2000) 78 CA4th 587, 591-592, 594, 92 CR2d 890.

It is not necessary that a victim of domestic violence have been repeatedly abused over an extended period of time for evidence of battering and its effects to be admissible in rehabilitating the victim's credibility. *People v Brown, supra,* 33 C4th at 908; *People v Williams* (2000) 78 CA4th 1118, 1129, 93 CR2d 356.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.53 6. Time for Offering Expert Testimony

§5.53 6. Time for Offering Expert Testimony

There is some confusion regarding whether the prosecution may offer expert testimony regarding the victim or class of victims in the prosecution's case-in-chief, or whether it must wait until rebuttal.

At least one California case has explicitly ruled on the propriety of offering expert testimony regarding child sexual abuse accommodation syndrome (CSAAS) in the prosecution's case-in-chief. In *People v Patino* (1994) 26 CA4th 1737, 1744-1746, 32 CR2d 345, a child molestation case, the appellant challenged the introduction of expert testimony on CSAAS in the prosecution's case-in-chief, claiming prejudice because the testimony bolstered the victim's version of events and diminished his case and version of events. The victim in *Patino* had returned to the defendant's residence after the first incident of abuse and had delayed in reporting the molestations for several weeks. 26 CA4th at 1740-1743. The court held that admitting expert testimony in the prosecution's case-in-chief was not error, because the victim's credibility had been placed in issue by her delay in reporting the alleged offenses, and by her return to the defendant's home after the offenses had allegedly occurred. The court also noted that if the prosecution were limited to addressing such credibility issues only in rebuttal after the issues are raised by defendant, defendant could prevent introduction of such testimony by not commenting on the credibility issues until closing argument. 26 CA4th at 1745. Furthermore, the trial court gave the jury an appropriate limiting instruction regarding the jury's appropriate use of the testimony. 26 CA4th at 1746.

Similarly, introduction during the prosecution's case-in-chief of expert witness testimony as to the borderline mental retardation of a sexual assault victim was permitted in *People v Herring* (1993) 20 CA4th 1066, 1071-1073, 25 CR2d 213, citing Evid C §801 and *People v McAlpin* (1991) 53 C3d 1289, 1299-1300, 283 CR 382. The appellate court found that, although admission of evidence to rehabilitate the witness during the case-in-chief was premature, the trial court did not err in allowing such testimony because the victim's ability to perceive and recollect were at issue, and the prosecutor had to prove lack of consent. *People v Herring, supra,* 20 CA4th at 1072. The court further noted that the prosecution did not have to wait to see if the defense would capitalize on the victim's halting responses and inconsistencies to explain that the victim was mentally a child. *People v Herring, supra,* 20 CA4th at 1073, citing *People v Housley* (1992) 6 CA4th 947, 8 CR2d 431.

In *People v Luna* (1988) 204 CA3d 726, 734-737, 250 CR 878, disapproved on other grounds in 51 C3d 294, the court found that allowing an expert witness to testify regarding CSAAS immediately after testifying regarding the results of his examination of the victim, though problematic, was not error. The CSAAS testimony related to victims as a class and did not discuss or diagnose the victim. *People v Luna, supra,* 204 CA3d at 736-737. In addition, the trial court took appropriate steps to alleviate any potential by instructing the jury that the CSAAS testimony related to victims as a class and was not a discussion of or diagnosis of the victim. 204 CA3d at 737.

In contrast, in *People v Bowker* (1988) 203 CA3d 385, 394, 249 CR 886, the court of appeals implied that permitting a psychologist to give CSAAS testimony during the prosecution's case-in-chief rather than in rebuttal suggests that the purpose of the testimony is to suggest that the victims were in fact abused, rather than to rebut defense attacks on the credibility of the complaining victims. The court further noted the "potential tension in a rule which would reject CSAAS testimony when offered in the main case but allow similar evidence if presented for rebuttal purposes." *People v Bowker, supra,* 203 CA3d at 392 (referring to rule established in *People v Bledsoe* (1984) 36 C3d 236, 247-248, 203 CR 450); see §5.50. But see *People v Housley* (1992) 6 CA4th 947, 956, 8 CR2d 431 (rejecting suggestion in *Bowker* that expert CSAAS testimony may be used only to rebut defense attacks on victim credibility).

Similarly, in *People v Jeff* (1988) 204 CA3d 309, 251 CR 135, the court held that it was reversible error to introduce evidence about CSAAS and its impact on the victim's behavior during the prosecution's case-in-chief. 204 CA3d at 337-339. In so holding, the court noted that *Jeff* was not a case in which expert testimony of "child molest syndrome" was offered in rebuttal to rehabilitate a victim-witness. 204 CA3d at 337. Rather, the court found that the prosecution was attempting to use the expert testimony to prove that the offenses actually occurred and to corroborate the victim's testimony by linking the victim's behavior and statements to the syndrome. 204 CA3d at 334-337, 337-339. Of course, use of such testimony to prove that the alleged offense actually occurred would be an impermissible use of CSAAS

impact testimony, whether in the prosecution's case-in-chief or on rebuttal. See *People v Bledsoe* (1984) 36 C3d 236, 250-252, 203 CR 450 (expert testimony offered during prosecution's case-in-chief that complaining witness suffered from rape trauma syndrome is not admissible to prove that witness was actually raped); see also *People v Roscoe* (1985) 168 CA3d 1093, 1099-1101, 215 CR 45 (expert testimony regarding victims of CSAAS as class is admissible when offered on rebuttal to rehabilitate victim's credibility after defendant attacks it).

It is doubtful, however, that the rulings in either *Bowker* or *Jeff* were due solely to the introduction of expert testimony regarding CSAAS as part of the prosecution's case-in-chief rather than in rebuttal. Courts have upheld the use of such evidence in both the prosecution's case-in-chief and in rebuttal, when used for purposes other than to show the defendant's guilt.

§5.54 7. Expert Testimony on Domestic Violence Offenders

Expert testimony on domestic violence offenders may be useful to explain typical characteristics of batterers. These include minimization, denial, and intellectualization; blaming the victim for the violence; extreme possessiveness and jealousy; traditional sex role attitudes; poor communication skills; withdrawal during times of stress; extremes of kindness and cruelty; social isolation; and impulsiveness. Sonkin, Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence, pp 221-223 (New York: Springer Pubs. Co., 1987). See, *e.g.*, *State v Griffin* (Iowa 1997) 564 NW2d 370, in which the alleged victim of domestic violence recanted earlier statements about the abuse. The expert for the prosecution testified that it is reasonable for battered women to believe that another beating is inevitable, that the criminal justice system and counselors will not stop the violence, and that lying is a lifesaving skill for her. This is because she must prove her loyalty to the batterer at all times and focus on his needs. The expert also stated that batterers typically perceive that the abuse is the fault of the victim, that he is omnipotent in her life, and that her job is to protect him. The testimony was upheld on appeal.

Expert testimony may also be appropriate to place into perspective the impact of alcohol or drug use on the defendant's ability to form intent, to put into context any history of violence in the defendant's childhood, or to explain past abuse the defendant has perpetrated on the victim or others. Sonkin, pp 227-230.

Expert testimony may be appropriate to rebut a defense that a male defendant was a battered husband who acted in self-defense. Sonkin, pp 224-225, 230-234. Other defenses in domestic violence cases that may be rebutted through expert testimony include accident and insanity at the time of the offense. See *Estelle v McGuire* (1991) 502 US 62, 68-69, 112 S Ct 475, 116 L Ed 2d 385 (applying California law in holding that "battered child syndrome" testimony may establish intent and thus rule out accident in second-degree murder prosecution); *People v Jackson* (1971) 18 CA3d 504, 507, 95 CR 919 ("battered child syndrome" testimony may rule out accident); *State v Baker* (1980) 120 NH 773, 775-776, 424 A2d 171 (testimony regarding "battered wife syndrome" may be offered to rebut defendant's evidence on issue of insanity).

A New Hampshire court upheld the admission of expert testimony on a domestic violence offender in *State v Baker, supra*. In that case, the defendant was convicted of the attempted first-degree murder of his wife. He had pleaded not guilty by reason of insanity, waiving his right to a bifurcated trial on the insanity issue. The defense called two psychiatrists to testify that in their opinion, the defendant was legally insane at the time of trial. 120 NH at 774. The victim and the couple's daughter testified to many incidents of beatings by the defendant. The prosecution called an expert in domestic violence who testified that current research does not indicate that mental illness is an important cause of wife beating, and in his opinion, a marriage such as the defendant's would probably fall within the contours of battered women's syndrome. On cross-examination, one of the defense psychiatrists agreed. 120 NH at 775. The appellate court upheld the use of expert testimony to rebut the defendant's evidence on the issue of insanity by providing an alternative explanation for the assault. 120 NH at 775-776.

§5.55 8. Testimony of Pathologists and Medical Personnel

Testimony of expert witnesses who are pathologists and medical personnel has been upheld in cases involving murder, rape, and child sexual and physical abuse.

In *People v Catlin* (2001) 26 C4th 81, 132-133, 109 CR2d 31, the court upheld the admission of testimony by a pathologist who conducted an autopsy on the murdered mother of defendant, although the pathologist had no previous experience with paraquat, the poison allegedly used in the murder. The pathologist was allowed to testify at trial that in his opinion, based on a toxicology report disclosing the presence of paraquat in the victim's lungs and liver, the victim had died of paraquat poisoning. 26 C4th at 132. The Supreme Court found that the pathologist, who had performed over 11,000 autopsies and had studied medical literature regarding paraquat toxicology, had sufficient specialized training to reach an informed conclusion as to the cause of the victim's death, despite the fact that he had never before performed an autopsy in which the cause of death was paraquat poisoning. 26 C4th at 132-133.

In *People v Rance* (1980) 106 CA3d 245, 254-255, 164 CR 822, the appellate court upheld the admission of expert testimony from an emergency room nurse who treated the sexual assault victim in the case. The nurse testified that in her opinion, the victim had been "physically violated by bruises," and "she had physical violence put upon her by someone else." 106 CA3d at 254. The trial court reasonably concluded that the nurse had sufficient experience in observing wounds and bruises of trauma victims to be capable of rendering an opinion that violence had been inflicted on the victim when the witness had been a registered nurse for over seven years, she had worked in the emergency room clinic at UC Davis Medical Center prior to working in the emergency room, and she had taken care of all kinds of patients, including trauma victims. 106 CA3d at 255.

Courts have also upheld the testimony of medical doctors to establish child sexual abuse. See, *e.g.*, *People v Mendibles* (1988) 199 CA3d 1277, 1287-1288, 1292-1298, 245 CR 553. In *Mendibles,* a pediatrician was allowed to testify at trial that the victims had suffered injuries consistent with sexual abuse, based on her macroscopic and microscopic examinations of the children. The court noted that the expression of an expert medical opinion as to the cause of a wound or injury falls outside the *Kelly* realm. An expert medical witness is qualified to give an opinion on the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself. 199 CA3d at 1293. The court further found that the pediatrician possessed sufficient expertise on the subject of child sexual abuse to testify as an expert on the subject, given her years in practice, her board certification in pediatrics, her experience as director of the University of Southern California School of Medicine's child sexual abuse program, and her examination of over 400 children suspected to be victims of sexual abuse. 199 CA3d at 1295-1298,

Similarly, in *People v Jackson* (1971) 18 CA3d 504, 505-508, 95 CR 919, the court upheld the admission of testimony by a physician that the injuries suffered by the child victim in the case were symptomatic of battered child syndrome.

§5.56 B. Expert Testimony Offered by Defense

When expert testimony is offered by the defense in a domestic violence case, the same analysis applies as when it is offered by the prosecution. For example, expert testimony on the impact of intimate partner battering is not subject to the *Kelly* test when it is confined to discussing battered victims or batterers as a class, rather than stating an opinion about the particular victim or defendant. See Evid C §1107(a) (expert testimony on effects of intimate partner battering offered by either defense or prosecution is admissible); for discussion of Evid C §1107, see §5.48. In addition, the defense may offer a psychologist's opinion testimony, based on interviews and professional interpretation of standardized written personality tests, that the defendant fails to exhibit signs of sexual deviancy. *People v Stoll* (1989) 49 C3d 1136, 1152-1154, 265 CR 111 (not necessary to satisfy *Kelly* test in this situation); for discussion of *Kelly* test, see §5.50.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.57 1. Testimony on Battering and Its Effects

§5.57 1. Testimony on Battering and Its Effects

In some instances, the defense may seek to introduce evidence of the effects of intimate partner battering, even in cases where the alleged battered partner is the complaining witness. For example, the prosecution may introduce evidence that the victim was a battered partner, which in turn may result in a defense argument that the victim did not suffer from intimate partner battering, but rather that the victim provoked the incident resulting in his or her injuries or death, and the defendant acted in self-defense.

Such testimony may also arise in instances when the victim of intimate partner battering is charged with a crime. For instance, there are three possible purposes for which expert testimony on the effects of intimate partner abuse is relevant in murder cases where the defendant has been a victim of domestic violence (*People v Jaspar* (2002) 98 CA4th 99, 107, 119 CR2d 470):

(1) To assist the jury in assessing the defendant's credibility and in objectively analyzing the defendant's claim of self-defense by dispelling commonly held misconceptions about battered partners.

(2) To show that the defendant believed he or she was in danger of death or great bodily injury, which is necessary for a finding of both perfect and imperfect self-defense.

(3) To assist the jury in deciding the reasonableness as well as the existence of defendant's belief that killing was necessary.

An expert may not testify regarding the effects of intimate partner battering to offer an opinion on the defendant's actual state of mind in a case in which the defendant pleaded mental disease or defect. *People v Erickson* (1997) 57 CA4th 1391, 1401-1402, 67 CR2d 740; see §5.59.

The court in *People v Aris* (1989) 215 CA3d 1178, 264 CR 167, ruled that testimony regarding the effects of intimate partner battering is admissible, although it limited its relevancy "to show that the defendant genuinely believed she was in imminent danger of serious bodily injury." 215 CA3d at 1199. The appellate court ruled that it was error not to permit the expert to testify "as to how the defendant's particular experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect herself." 215 CA3d at 1198. However, the court excluded expert testimony on the reasonableness of the defendant's belief that use of force was necessary, finding that California law "is not concerned with the reasonableness of the defendant's mental processes, but with what the hypothetical reasonable person would have done." 215 CA3d at 1197.

Thus, within the limits set out in *Aris*, the court held that expert testimony regarding the effects of intimate partner battering is admissible, both in general and as it applies to the particular defendant. In addition, as noted in Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women,* 2 S Cal Rev of Law & Women's Studies 219, 224 (1992), the *Aris* court allowed the defense expert to testify about the particular defendant, in contrast to limitations placed on the prosecution that require the expert to testify about victims in general. See Evid C §1107(a) (when offered by defense, expert testimony regarding effects of intimate partner battering is admissible even if offered to prove occurrence of acts of abuse forming basis of criminal charge).

In *People v Day* (1992) 2 CA4th 405, 2 CR2d 916, the defendant successfully appealed her conviction for involuntary manslaughter and assault with a deadly weapon based on ineffective assistance of counsel, when her trial attorney failed to investigate or present evidence of the effects of intimate partner battering. After a history of severe abuse, culminating in a fight in which the batterer attacked his partner with a knife, the battered woman stabbed the batterer to death, then ran away and appeared to be unaware of the severity of the injuries. 2 CA4th at 407-412. The appellate court found that evidence of the effects of intimate partner battering was not relevant to show the objective reasonableness of the defendant's actions, but did find such evidence relevant to show that defendant's conduct was consistent with having acted in self-defense, and to rehabilitate her credibility. Such evidence, if believed, would help the jury understand the defendant's apparently aberrant behavior. 2 CA4th at 415-419.

However, in 1996, the California Supreme Court ruled that evidence of the effects of intimate partner battering can be introduced to show the reasonableness of a defendant's belief that he or she was faced with imminent injury or

death from the abuser. *People v Humphrey* (1996) 13 C4th 1073, 56 CR2d 142. In *Humphrey*, the Supreme Court held that the trial court committed reversible error in instructing the jury that it could consider evidence regarding the effects of intimate partner battering in deciding whether defendant actually believed it was necessary to kill in self-defense, but not in deciding whether that belief was reasonable. 13 C4th at 1076-1077, 1089-1090. In so holding, the court concluded that *Aris* and *Day* had interpreted the reasonableness element too narrowly, by failing "to consider that the jury, in determining objective reasonableness, must view the situation from the *defendant's perspective*." 13 C4th at 1086 (emphasis in original).

The *Humphrey* court noted expert testimony in the case that as violence escalates, a battered person may become increasingly sensitive to the abuser's behavior, and thus may be able reasonably to discern when danger is real and when it is not. Such a conclusion "could significantly affect a jury's evaluation of the *reasonableness* of defendant's fear for her life." 13 C4th at 1086 (emphasis in original). The court reasoned that expert testimony should be considered in evaluating the reasonableness of the defendant's belief because "the ultimate question for the jury is whether a reasonable *person*, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm. Moreover, it is the *jury*, not the expert, that determines whether defendant's belief and ultimately, her actions, were objectively reasonable." 13 C4th at 1087 (emphasis in original). The court therefore disapproved of *Aris* and *Day* to the extent that they are inconsistent with this conclusion. 13 C4th at 1089.

§5.58 2. Testimony of Pathologists and Medical Personnel

The defense may seek to offer medical testimony to raise a reasonable doubt about the cause of the injuries alleged. See, *e.g.*, *People v Lewis* (2004) 120 CA4th 837, 847, 15 CR3d 891 (defense in child abuse case offered medical experts who concluded victim's head injuries were caused either by past fall from couch or in recent accidental fall while being held by defendant).

§5.59 3. Psychiatric Testimony

The defense may seek to admit psychiatric testimony in a domestic violence case, claiming that the victim suffered from a mental illness rather than from the effects of intimate partner battering. Additionally, the defendant may claim not to have actually formed the requisite intent.

California courts have admitted expert testimony regarding mental illnesses, disorders, or defects suffered by defendants. See, *e.g.*, *People v Whitler* (1985) 171 CA3d 337, 340, 214 CR 610. Under Pen C §29, however, an expert testifying about a defendant's mental illness, disorder, or defect is prohibited from testifying as to whether the defendant had the required mental state. That determination must be made by the trier of fact. Pen C §29.

In *Whitler,* the defendant was convicted of the murder of her estranged common-law husband, though there was no mention of battering by either party. The defendant placed her state of mind in issue and called a psychiatrist and a psychologist to testify about her mental disorders. 171 CA3d at 340. The court distinguished between testimony regarding the defendant's mental condition at the time of the killing, which was admissible, and her capacity to formulate malice aforethought or to possess the requisite mental state at the time of the killing, which was inadmissible. 171 CA3d at 340-341. The court further held that Pen C §29 prevails over Evid C §805, which permits opinion evidence regarding an ultimate issue to be decided by the trier of fact. 171 CA3d at 341.

Evidence Code §1107(a) merely codifies existing rules concerning use of testimony regarding intimate partner battering. *People v Erickson* (1997) 57 CA4th 1391, 1401, 67 CR2d 740; see Evid C §1107(d), (f). It does not create an exception to Pen C §29. 57 CA4th at 1401-1402. Thus, where the defendant has put his or her mental state at issue by claiming a mental illness, disorder, or defect, an expert testifying regarding the effects of intimate partner battering cannot offer an opinion on the defendant's actual state of mind at the time of the offense. It follows that the expert is not permitted to give an opinion on whether the defendant actually perceived that he or she was in danger and needed to defend himself or herself. 57 CA4th at 1400-1401.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/ IX. EVIDENCE OF UNCHARGED MISCONDUCT/§5.60 A. Admissibility of Other Bad Acts by Defendant

IX. EVIDENCE OF UNCHARGED MISCONDUCT

§5.60 A. Admissibility of Other Bad Acts by Defendant

In general, evidence of a person's character or a character trait is inadmissible if offered to prove the person's conduct on a specific occasion. Evid C §1101(a). However, there are numerous exceptions to this rule. For example, Evid C §1101 does not prohibit admission of evidence that a person committed a crime, civil wrong, or other act if relevant to prove some fact other than the person's disposition to commit such an act. Evid C §1101(b). Facts that may be proven through the use of such evidence include motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. See Evid C §1101(b). These issues may generally be categorized into (a) mental elements of the crime, *e.g.,* intent, motive, lewd disposition toward a particular victim; and (b) act elements of the crime, including behavior pattern to show identity. See Jefferson's California Evidence Benchbook, §§35.18-35.40 (4th ed CJA-CEB 2009). The rules that apply to admissibility of prior bad acts by a defendant under Evid C §1101(b) also apply to bad acts occurring subsequent to the offense charged, as long as they occur before trial. *People v Balcom* (1994) 7 C4th 414, 422-426, 27 CR2d 666; *People v Coefield* (1951) 37 C2d 865, 869-870, 236 P2d 570.

Evidence Code §1109 provides an exception to Evid C §1101 in domestic violence cases. In a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is admissible for all purposes, including to prove that the defendant had the propensity to commit the charged offense, when such evidence is not inadmissible under Evid C §352. Evid C §1109(a)(1); see *People v Poplar* (1999) 70 CA4th 1129, 1135-1138, 83 CR2d 320 (upholding trial court's admission of evidence under Evid C §1109 in absence of abuse of discretion). For discussion of Evid C §352, see §5.61. For purposes of Evid C §1109, "domestic violence" is generally defined by reference to Pen C §13700. See Evid C §1109(d)(3). Evidence of acts occurring more than 10 years before the charged offense is inadmissible under Evid C §1109, unless the court determines that admitting such evidence is in the interest of justice. Evid C §1109(e). Acts of domestic violence as defined under Fam C §6211 are admissible only if the act occurred no more than five years before the charged offense, and only after a hearing under Evid C §352, which must include consideration of any corroboration and remoteness in time. Evid C §1109(d)(3).

Admission of evidence of a defendant's prior domestic violence acts under Evid C §1109 does not violate the defendant's right to due process. *People v Johnson* (2000) 77 CA4th 410, 419-420, 91 CR2d 596. See also CALCRIM 852 and CALJIC 2.50.02 (jury instructions explaining application of Evid C §1109). Nor is it a violation of the right to equal protection. *People v Jennings* (2000) 81 CA4th 1301, 1311-1312, 97 CR2d 727. Because the essence of domestic violence is the propensity to harm intimate partners, the Legislature has determined in enacting Evid C §1109 that the danger of admitting uncharged acts of domestic violence in criminal domestic violence cases is outweighed by the need to interrupt an escalating pattern of violence. *People v Hoover* (2000) 77 CA4th 1020, 1027-1028, 92 CR2d 208; *People v Johnson, supra,* 77 CA4th at 419.

Evidence Code §1108 carves out an additional exception to Evid C §1101 by authorizing admission of evidence of a defendant's commission of another sexual offense or offenses in criminal actions in which the defendant is accused of a sexual offense, when such evidence is not inadmissible under Evid C §352. Evid C §1108(a). As with Evid C §1109, admission of evidence of prior sexual offenses under Evid C §1108 does not violate the defendant's due process rights. *People v Falsetta* (1999) 21 C4th 903, 912-922, 89 CR2d 847. See also CALCRIM 1191 and CALJIC 2.50.01 (jury instructions explaining application of Evid C §1108). Nor does it violate the defendant's right to equal protection. *People v Fitch* (1997) 55 CA4th 172, 184-185, 63 CR2d 753. In enacting Evid C §1108, the Legislature determined that the need for this evidence is critical given the serious and secretive nature of sex crimes and the frequent credibility contest that results at trial. *People v Falsetta, supra,* 21 C4th at 911.

A failure to admit evidence of a victim-batterer's prior violent conduct may produce error of constitutional dimensions. See *DePetris v Kuykendall* (2001) 239 F3d 1057, 1062 (habeas corpus case applying California law; defendant on trial for killing batterer husband asserted self-defense). In *DePetris*, the excluded evidence was a journal belonging to

defendant, in which he described his prior acts of domestic violence toward other intimate partners. See 239 F3d at 1060-1061. Given the fact that defendant's sole defense was that she killed her husband in an honest belief that she needed to do so to save her life, excluding the journal evidence violated the defendant's right to a fair trial and to present a defense. 239 F3d at 1062-1065.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.61 1. Weighing Probative Value Versus Danger of Undue Prejudice

§5.61 1. Weighing Probative Value Versus Danger of Undue Prejudice

Evidence Code §352 provides that the court, in its discretion, may exclude evidence if its probative value is substantially outweighed by the probability that admission will require undue consumption of time, or will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Evid C §352. Both Evid C §§1108 and 1109 condition admissibility of prior or subsequent bad acts by defendant on their admissibility under Evid C §352. See Evid C §§1108(a), 1109(a). Courts also apply Evid C §352 to admission of evidence of another crime, civil wrong, or other acts under Evid C §1101(b). See *People v Ewoldt* (1994) 7 C4th 380, 404, 27 CR2d 646; *People v Walker* (2006) 139 CA4th 782, 806, 43 CR3d 257.

Thus, trial courts have discretion under Evid C §352 to exclude evidence that might otherwise be admissible under Evid C §1101(b), §1108, or §1109, because of its potential prejudicial effect on the jury. See *People v Falsetta* (1999) 21 C4th 903, 907, 916-918, 89 CR2d 847 (Evid C §1108); *People v Walker, supra,* 139 CA4th at 806 (Evid C §1101(b)); *People v Johnson* (2000) 77 CA4th 410, 420, 91 CR2d 596 (Evid C §1109). In applying Evid C §352, "prejudicial" is not synonymous with "damaging." The "prejudice" referred to in Evid C §352 applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual, and which has very little effect on the issues. *People v Rucker* (2005) 126 CA4th 1107, 1119, 25 CR3d 62; *People v Poplar* (1999) 70 CA4th 1129, 1138, 83 CR2d 320.

Because of Evid C §§1108 and 1109, trial courts may no longer deem "propensity" evidence unduly prejudicial per se, but must engage in a careful weighing process under Evid C §352. See *People v Falsetta, supra,* 21 C4th at 916-917 (decided under Evid C §1108). Rather than admit or exclude every past act of domestic violence or sex offense that a defendant commits, trial judges must consider factors such as (see *People v Falsetta, supra,* 21 C4th at 917 (applying Evid C §1108)):

(1) The nature, relevance, and possible remoteness of the act or offense;

(2) The degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry;

(3) The similarity of the act or offense to the charged offense;

(4) The likely prejudicial impact of the act or offense on jurors;

(5) The burden on the defendant in defending against an uncharged act or offense; and

(6) The availability of less prejudicial alternatives to the outright admission of the past act or offense, such as admitting some but not all of the defendant's other acts or sex offenses, or excluding irrelevant although inflammatory details surrounding the act or offense.

In *People v Kelley* (1997) 52 CA4th 568, 579, 60 CR2d 653, a stalking case, the court of appeal upheld admission under Evid C §1101(b) of defendant's prior conviction for molestation of the same victim when she was a minor. The fact of the conviction and defendant's allegations that the victim had perjured herself in the prior proceedings were found relevant to show his motive for stalking her and placing her in fear. *People v Kelley, supra,* 52 CA4th at 578-579. The appellate court further found that any prejudice was minimized by proof of the conviction, and by the fact that the prior conviction involved an offense different from stalking. 52 CA4th at 579.

In *People v Branch* (2001) 91 CA4th 274, 281-287, 109 CR2d 870, a child molestation case involving acts allegedly committed by defendant against his step-granddaughter, the trial judge did not err in admitting evidence under Evid C §1108(a), of uncharged prior sexual offenses committed by defendant against the child's mother over 30 years earlier, when the evidence was highly probative, there was no evidence of confusion of issues by jurors, the prior offenses were remarkably similar to the current offenses, and the stepdaughter's testimony did not require a substantial amount of court time.

In *People v Poplar, supra,* 70 CA4th at 1138-1139, in which defendant was found guilty of forcible rape of his current girlfriend and cohabitant, the court of appeal upheld admission of evidence under Evid C §1109 of the defendant's prior acts of violence against former girlfriends. The court found that describing defendant's prior acts of domestic violence was no more inflammatory than the victim's testimony describing the rape, and that the evidence of defendant's prior

acts was extremely probative in showing his propensity for violence against domestic partners. The court further found that there was no probability of confusing the jury with the prior acts of domestic violence, the incidents were relatively recent and required little time to relate, and they were not the sort to evoke an emotional bias against defendant. 70 CA4th at 1139.

In *People v Brown* (2000) 77 CA4th 1324, 1337-1338, 92 CR2d 433, the court of appeal held that the trial court did not abuse its discretion under Evid C §352 in admitting evidence of defendant's prior acts of domestic violence against former girlfriends, when the trial judge provided an in-depth explanation of the reasons for admitting the testimony, evidence of the past uncharged offenses was not inflammatory, and there was no possibility of confusion between the past acts and the charged acts. In addition, the prior acts were not remote in time, and evidence about the acts did not consume much time at the trial. 77 CA4th at 1338. In *People v Escobar* (2000) 82 CA4th 1085, 1088, 1096-1097, 98 CR2d 696, in which defendant was charged with first-degree murder of his wife, the court of appeal upheld the trial judge's admission of a past uncharged instance of domestic violence under Evid C §1109, although the incident was five years earlier and may have been part of a mutual affray.

§5.62 2. Bad Acts Toward Same Victim

Evidence Code §1101(a) provides that evidence of a person's character is inadmissible when offered to prove his or her conduct on a specific occasion. Thus, if the evidence is offered solely to prove criminal disposition or propensity on the part of the accused, the evidence is inadmissible. However, there are numerous statutory exceptions. See discussion in §5.60.

In addition, case law has created a "domestic violence exception" to the usual rules in cases involving the same defendant and same victim. When a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults on the same victim, when offered on disputed issues such as identity, intent, motive, and the like, are admissible based solely on the consideration of identical perpetrator and victim without resorting to a "distinctive modus operandi" analysis of other factors. *People v Zack* (1986) 184 CA3d 409, 415, 229 CR 317.

In *People v Linkenauger* (1995) 32 CA4th 1603, 38 CR2d 868, the defendant was convicted of first-degree murder of his wife. The prosecution, relying on *Zack*, moved to introduce evidence concerning marital discord and defendant's prior assaults against his wife. Over appellant's objection, the trial court admitted the evidence on the issues of intent, motive, and identity. 32 CA4th at 1609. The court of appeal held that "a broader range of evidence may be presented to show motive, intent, and identity where the prior misconduct and charged offense involves the identical perpetrator and victim." 32 CA4th at 1613. The court further noted that the Supreme Court's decision in *People v Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, did not affect the validity of *Zack. People v Linkenauger, supra*, 32 CA4th at 1601, 1612-1613. Thus, even before enactment of Evid C §1109, case law held that an uncharged act of domestic violence committed by the same perpetrator against the same victim is admissible. *People v Hoover* (2000) 77 CA4th 1020, 1026, 92 CR2d 208.

3. Application of Evidence of Bad Acts

§5.63 a. Mental Element: Intent

In *People v Cartier* (1960) 54 C2d 300, 5 CR 573, defendant was convicted of the first-degree murder of his wife. Admission of evidence of prior quarrels between the spouses, and the making of threats by the defendant, was upheld to show the defendant's motive and state of mind. 54 C2d at 311.

Similarly, in *People v Toth* (1960) 182 CA2d 819, 6 CR 372, defendant was charged with and convicted of second-degree murder for beating his wife to death. Evidence of prior beatings was admitted to rebut defendant's testimony that his marriage was a happy one and that he had only "mildly" hit her before her death. The appellate court held that the evidence was admissible to impeach his testimony and to prove malice aforethought. 182 CA2d at 827. See also *People v Lopez* (1969) 1 CA3d 78, 85, 81 CR 386 (feud between two families as alleged motive for defendant's assault on victim; motive's "probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence").

In *People v Zack* (1986) 184 CA3d 409, 415, 229 CR 317, in which the defendant was convicted of the first-degree murder of his ex-lover, the appellate court upheld admission of evidence of the defendant's prior assaults on the victim for the purpose of showing motive and ill will. See also *People v Benton* (1979) 100 CA3d 92, 97-98, 161 CR 12 (specific incidents showing prior quarrels or antagonism between defendant and victim are admissible to show defendant's identity as perpetrator and his motive for crime); *People v Pivaroff* (1934) 138 CA 625, 627, 33 P2d 44 (prior assault with deadly weapon and beating of wife admissible to show motive).

§5.64 b. Motive To Rebut Accident or Heat-of-Passion

Evidence of a defendant's past abusive or bad acts are admissible in demonstrating motive to rebut an accident or heat-of-passion defense. In *People v Heckathorne* (1988) 202 CA3d 458, 248 CR 399, defendant was convicted of second-degree murder of a neighbor. Testimony by three survivors in the apartment next door that defendant had stated the night before shooting the victim, "I could kill you in a minute, just as easy as I could kill a cop," was held properly admitted as evidence of malice or intent when defendant raised a defense of accident. 202 CA3d at 460-461.

In *People v Bufarale* (1961) 193 CA2d 551, 14 CR 381, the defendant was charged with second-degree murder for stabbing his former lover to death. At the trial, he testified that he did not remember anything that happened during the course of the stabbing, and that the killing occurred in the heat of passion. The court of appeal affirmed the receipt of evidence of defendant's previous relationship with another woman to establish malice aforethought, intent, and premeditation. 193 CA2d at 558. The evidence showed that in each instance, the defendant had been rejected, made threats, and retaliated. 193 CA2d at 554-557.

Courts have also admitted evidence of abuse toward other victims in child abuse cases to rebut accident defenses. See *People v Weisberg* (1968) 265 CA2d 476, 479-480, 71 CR 157; *People v York* (1966) 242 CA2d 560, 568, 51 CR 661. The mental elements of intent and knowledge, which the defendant had placed in issue in a child abuse case, were the grounds for admitting evidence that defendant had abused another of his children in *People v Thomas* (1978) 20 C3d 457, 143 CR 215. In that case, the Supreme Court held that evidence of prior misconduct committed with persons other than the prosecuting witness is admissible to show a common design or plan when the prior offenses (1) are not too remote in time, (2) are similar to the offense charged, and (3) are committed on persons similar to the prosecuting witness. 20 C3d at 465.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.65 c. Lewd Disposition

§5.65 c. Lewd Disposition

In sexual assault or child sexual abuse cases, courts have admitted evidence of prior similar conduct by the defendant towards the same victim, on the rationale that the evidence tends to show that defendant had a "lewd disposition" towards the victim. See, *e.g., People v Sylvia* (1960) 54 C2d 115, 119-120, 4 CR 509; *People v Stewart* (1986) 181 CA3d 300, 226 CR 252; *People v Brunson* (1986) 177 CA3d 1062, 1068-1069, 223 CR 439 (testimony should have been excluded because uncorroborated); *People v Moon* (1985) 165 CA3d 1074, 1078-1081, 212 CR 101; *People v Dunnahoo* (1984) 152 CA3d 561, 574, 199 CR 796; *People v Barney* (1983) 143 CA3d 490, 494, 192 CR 172. The theory of "lewd disposition" may be transferable to the domestic violence setting when the defendant batterer has demonstrated a consistent disposition toward the victim.

The court in *People v Rios* (1992) 9 CA4th 692, 708-709, 12 CR2d 15, clarified the holding of *People v Moon, supra,* that evidence of uncharged prior sexual offenses against the prosecuting witness is not admissible to show lewd intent toward that witness when the only evidence of both charged and uncharged offenses is the uncorroborated evidence of that witness. The court held that when the evidence of the charged offense consists of the prosecuting witness's testimony plus some corroborating evidence, there need not be separate corroborating evidence for each uncharged sexual offense committed against the prosecuting witness before that witness's testimony may be admitted as to the uncharged offense or offenses, as long as the evidence of uncharged offenses "adds something to the prosecution's case," *i.e.*, it is relevant, material, and noncumulative. 9 CA4th at 709.

§5.66 d. Act Element: Behavior Pattern To Show Identity

Evidence of a defendant's uncharged misconduct is relevant when the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan. *People v Ewoldt* (1994) 7 C4th 380, 401-402, 27 CR2d 646; *People v Carter* (2005) 36 C4th 1114, 1147, 32 CR3d 759. For identity to be established, however, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. *People v Ewoldt, supra,* 7 C4th at 403; *People v Carter, supra,* 36 C4th at 1148. Requiring a highly unusual and distinctive nature for both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense. *People v Balcom* (1994) 7 C4th 414, 425, 27 CR2d 666.

Thus, in *People v Archerd* (1970) 3 C3d 615, 638-639, 91 CR 397, the court admitted evidence of three prior murders in part because of the marked similarity between the method used in all six deaths (injection of insulin), and to show defendant's access and opportunity and the marked similarity of circumstances surrounding each death. All victims were close to defendant, loved and trusted him, but became "an unwanted burden" to him. Defendant was the only person with each of his wives at the time the injections were given, and he kept his wives from entering a hospital until it was too late. 3 C3d at 621. See also *People v Nottingham* (1985) 172 CA3d 484, 499-501, 221 CR 1 (rape-attempted murder, insufficient similarities); *People v Alcala* (1984) 36 C3d 604, 629-635, 205 CR 775 (rape-murder, insufficient similarities).

§5.67 e. Supporting or Attacking Credibility of Witness

When the defense presents evidence of defendant's good character, the prosecution can present evidence of prior bad acts to refute this. See Evid C §1102. In *People v Toth* (1960) 182 CA2d 819, 827, 6 CR 372, one of the bases for admission of evidence of prior assaults by the defendant on his wife was to rebut defendant's testimony that his marriage was a happy one and that he had only "mildly" hit her before her death. In *People v Collie* (1981) 30 C3d 43, 177 CR 458, the defendant was charged with spousal abuse. To attack the victim's credibility, defense counsel referred to prior domestic violence incidents in which the victim had called the police, but had not pressed charges, to prove that the victim was prone to summon the police without just cause. The prosecution then used this evidence to establish defendant's motive to retaliate and his belief that his wife would not press charges if he attacked her again. 30 C3d at 63 n18.

Evidence of prior felony convictions involving moral turpitude is also admissible to impeach a witness. *People v Castro* (1985) 38 C3d 301, 306, 211 CR 719; see Cal Const art I, §28(f)(4); Evid C §788. A conviction for felony corporal injury under Pen C §273.5 is a crime of moral turpitude that may be used by the prosecution to impeach the defendant's testimony. *People v Rodriguez* (1992) 5 CA4th 1398, 7 CR2d 495. In *Rodriguez*, the court of appeal found that willful infliction of corporal injury on a spouse or cohabitant involved moral turpitude because of the special relationship that exists between cohabitants. See 5 CA4th at 1402 (construing former version of statute applicable only to cohabitants of opposite sex).

In *Grageda v U.S. INS* (9th Cir 1993) 12 F3d 919, 921-922, the court held that a conviction for felony spousal abuse under Pen C §273.5 was a crime of moral turpitude that could serve as a basis for deportation. The court found that spousal abuse was an act of baseness or depravity contrary to moral standards. 12 F3d at 921. Because willfulness is an element of Pen C §273.5, these two factors make the crime one of moral turpitude. 12 F3d at 922. The court did not reach the question of whether cohabitant abuse involves moral turpitude. 12 F3d at 921 n1.

A conviction for making criminal threats (Pen C §422) has also been deemed a crime of moral turpitude for purposes of impeachment. *People v Thornton* (1992) 3 CA4th 419, 424, 4 CR2d 519. Similarly, misdemeanor sexual battery (Pen C §243.4) is a crime of moral turpitude that may be used to impeach the defendant. *People v Chavez* (2000) 84 CA4th 25, 30, 100 CR2d 680.

§5.68 B. Introduction of Evidence of Defendant's Bad Acts: Time for Offering

In general, evidence of other crimes will not be permitted as part of the prosecution's case-in-chief unless such evidence is relevant to a fact in dispute, such as identity or intent. When defendant has done nothing more than plead not guilty, the prosecutor may not offer the disputed evidence until rebuttal. See *People v Todd* (1969) 1 CA3d 547, 552-553, 81 CR 866 (because intent not was not in issue, evidence of other offenses must be presented in rebuttal). It is only after the defense has presented its case that the defense contentions will become known. See *People v Chacon* (1968) 69 C2d 765, 777 n5, 73 CR 10, disapproved on other grounds in 45 C4th 390, 421 n22 (evidence of other offense admissible to prove malice and to negate defense of noninvolvement can be introduced as rebuttal). See also *People v Perkins* (1984) 159 CA3d 646, 652, 205 CR 625 (advising trial judges on the procedure to follow when defense places ultimate fact in issue after prosecution's case-in-chief).

However, when evidence of other offenses is relevant to a fact that is part of the prosecution's burden of proof, such evidence is admissible in the prosecution's case-in-chief. *People v Archerd* (1970) 3 C3d 615, 639, 91 CR 397. In *Archerd*, a first-degree murder case, the court held that the prosecution had the burden of establishing intent and identity. Thus, it is not necessary for the defendant to have raised these issues before the prosecution may raise and meet them. 3 C3d at 639.

Later cases appear to disagree with *Archerd*, holding that if the accused has not actually placed the element in issue, evidence of uncharged offenses may not be admitted to prove it. *People v Thompson* (1980) 27 C3d 303, 315, 165 CR 289; *People v Perkins* (1984) 159 CA3d 646, 651, 205 CR 625 (relying on *Thompson*; prosecutor must wait until defendant places his or her intent and knowledge in issue; thus, evidence of uncharged offenses may not be admitted except on rebuttal); *People v Scott* (1980) 113 CA3d 190, 199, 169 CR 669 (also relying on *Thompson*). See also *People v Perez* (1974) 42 CA3d 760, 766-767, 117 CR 195 (disagreeing with breadth of *Archerd* holding). However, in *People v Rowland* (1992) 4 C4th 238, 14 CR2d 377, the Supreme Court rejected the argument in *Thompson* that a defendant does not put all elements of the charge in dispute by pleading not guilty. A fact like defendant's intent generally becomes "disputed" when raised by a plea of not guilty or a denial of an allegation and remains disputed until it is resolved. 4 C4th at 260, citing Pen C §1019 (plea of not guilty puts in issue every material allegation of accusatory pleading).

In addition, Evid C §1103(b) provides that evidence of the defendant's character or a character trait for violence in the form of specific instances of conduct is admissible if offered by the prosecution to prove conduct by the defendant conforming with the character or character trait. Such evidence, however, must be offered only after evidence is presented by the defendant that the victim had a character for or a trait of character tending to show violence under Evid C §1103(a)(1). Evid C §1103(b); for further discussion of Evid C §1103, see §§5.69-5.71.

§5.69 C. Prior Conduct by Victim

Evidence Code §1103(a) makes character evidence of the victim of a crime for which defendant is being prosecuted inadmissible, unless it is offered by the defendant to prove conduct of the victim in conformity with such character. See Evid C §1103(a)(1). The issue of the victim's prior conduct usually arises when the defendant claims self-defense or when the victim's credibility as a witness is in issue.

In specified sexual crimes, including spousal rape (Pen C §262), opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness's sexual conduct, or any of that evidence, is not admissible by the defendant to prove consent by the complaining witness. Evid C §1103(c)(1). This provision does not apply to evidence of the complaining witness's sexual conduct with defendant. Evid C §1103(c)(3). Furthermore, if the prosecutor introduces evidence or testimony, or the complaining witness gives testimony, related to the complaining witness's sexual conduct, the defendant may cross-examine the testifying witness and may offer relevant evidence limited specifically to rebutting the evidence introduced by the prosecutor or given by the complaining witness. Evid C §1103(c)(4). As used in Evid C §1103, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to Evid C §1103(c). Evid C §1103(c)(5).

§5.70 1. When Self-Defense Is in Issue

In a domestic violence case, the victim's prior conduct may be admissible if relevant to the issue of self-defense, subject to Evid C §352 considerations. See Evid C §1103; *People v Wright* (1985) 39 C3d 576, 587, 217 CR 212 (non-domestic violence homicide case).

A victim's prior history of violent conduct is admissible in certain circumstances to aid the defendant's self-defense theory. In *People v Shoemaker* (1982) 135 CA3d 442, 447-448, 185 CR 370, in which the defendant claimed self-defense in a non-domestic violence case, the appellate court held that evidence of a victim's subsequent acts of violence, when offered by the defendant in a criminal case, is relevant and admissible under Evid C §1103 to prove the victim's violent character at the time of the earlier crime.

In *People v Wright* (1985) 39 C3d 576, 586-588, 217 CR 212, another non-domestic violence self-defense case, the Supreme Court found that the trial court properly admitted evidence concerning the victim's violent reaction to a police officer during an arrest several years earlier and also upheld the trial court's exclusion of evidence under Evid C §352, which would have shown that the victim was under the influence of heroin at the time he resisted arrest. 39 C3d at 586-587. However, it found that the trial court improperly excluded evidence that the victim was under the influence of heroin within 24 hours of his death, although this was held to be harmless error. 39 C3d at 582-586.

§5.71 2. When Credibility of Victim Is in Issue

In a domestic violence case, prior conduct of the victim may be admissible to impeach his or her testimony, subject to Evid C §352 considerations. See Evid C §1103.

For instance, in *People v Burrell-Hart* (1987) 192 CA3d 593, 237 CR 654, a forcible rape case in which the defendant asserted a denial defense, the trial court abused its discretion in excluding evidence that the victim, who had argued with defendant before accusing him of rape, had previously falsely accused another man of breaking into her home and attempting to sexually assault her after having similarly argued with him. 192 CA3d at 597-598. The court of appeal held that such evidence is admissible under Evid C §1103(a). 192 CA3d at 598.

Evidence inadmissible to prove a victim's character trait may nonetheless be admissible to impeach the witness's testimony if it has a tendency to disprove the truthfulness of the testimony. However, although contradiction of some portion of a witness's testimony is a permissible method of impeaching a witness under Evid C §780(i), proof of the contradiction cannot be accomplished by evidence that is subject to an exclusionary rule. *In re Wing Y.* (1977) 67 CA3d 69, 77-78, 136 CR 390 (non-domestic violence case).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.72 D. Evidence of Prior Abuse of Victim by Previous Partners

§5.72 D. Evidence of Prior Abuse of Victim by Previous Partners

Occasionally, admissibility of prior abuse of the victim from previous partners arises as an issue. Such evidence is irrelevant unless an offer of proof has been made to show that the victim was the aggressor in the incidents with both the prior and current partners or that the victim had fabricated the previous charges. *People v Cameron* (1975) 53 CA3d 786, 789-790, 126 CR 44.

In *People v Cameron,* the defendant, convicted of inflicting corporal injury on his wife, asserted on appeal that the trial court improperly excluded evidence that his wife had been assaulted by a prior spouse who had also broken her nose. The appellate court upheld exclusion of the evidence, finding that there is no possible relevance to testimony as to prior assaults on a victim unless it can be shown that the victim was the aggressor. 53 CA3d at 789.

X. APPLICABLE EXCEPTIONS TO THE HEARSAY RULE

§5.73 A. Admissibility of Hearsay in Domestic Violence Cases

In some domestic violence trials, the victim may not testify. Instead, evidence, including statements that are exceptions to the hearsay rule, Evid C §1200, will be offered. For example, in *People v Hughey* (1987) 194 CA3d 1383, 240 CR 269, the victim, although available to testify, was not called. Her statements were introduced through the testimony of one of the responding officers and were received as spontaneous statements under Evid C §1240. 194 CA3d at 1387-1388.

"Hearsay evidence" is evidence of a statement made by other than a witness while testifying at the hearing that is offered to prove the truth of the matter stated. Evid C §1200(a). Unless otherwise provided by law, hearsay evidence is inadmissible. Evid C §1200(b). The California Evidence Code provides numerous exceptions to the admissibility of hearsay evidence. See, *e.g.*, Evid C §§1220-1380. In addition, exceptions to the hearsay rule are not limited to those enumerated in the Evidence Code. They may also be found in other codes and in decisional law, although judicial authority to create new hearsay exceptions is rarely exercised. *In re Cindy L.* (1997) 17 C4th 15, 27, 69 CR2d 803.

A probable cause finding at a preliminary hearing may be based in whole or in part on sworn testimony by a law enforcement officer relating out-of-court statements of declarants, even if offered for the truth of the matter asserted. See Evid C §872(b). In general, a contemporaneous translation of victim and witness statements provided to a police officer in a domestic disturbance case does not count as multiple hearsay when the officer testifies at a preliminary hearing, if the translation is fairly attributable to the declarant, since the translator serves as a "language conduit." *Correa v Superior Court* (2002) 27 C4th 444, 463, 117 CR2d 27. In *Correa*, a domestic violence case involving unmarried cohabitants who spoke Spanish, the translators were not "supplied" by the police, but happened to be on the scene. The record supported the conclusion that the translators were neutral and had no motive to mislead or distort. 27 C4th at 466-467. See also *People v Lopez* (1998) 64 CA4th 1122, 1125-1128, 76 CR2d 38 (preliminary hearing testimony of domestic violence victim unavailable at trial was properly admitted).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/ 1. Crawford v Washington and Its Impact/§5.74 a. Overview

1. *Crawford v Washington* and Its Impact

§5.74 a. Overview

Victims of domestic violence are often unavailable to testify at trial. Frequently, the victim may be emotionally or physically unavailable, or may refuse to testify, because of fear of or intimidation by the defendant. In some cases, the victim may be financially dependent on the defendant or may succumb to pressure not to testify from the defendant or others. Even when available to testify, domestic violence victims may recant or minimize their prior statements regarding the circumstances of the crime. The victim may also have died as a result of the alleged conduct by defendant. As a result, prosecutors in domestic violence cases often rely on exceptions to the hearsay rule to introduce prior testimony or statements by the victim. However, in the wake of the U.S. Supreme Court's decision in *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, the use of such prior statements or testimony in domestic violence cases has become more difficult.

In *Crawford v Washington*, the Supreme Court held that admitting "testimonial" hearsay statements against a criminal defendant violates the defendant's rights under the Sixth Amendment confrontation clause unless the declarant is unavailable to testify and be cross-examined at trial, and the defendant had a previous opportunity to cross-examine the declarant, regardless of a judicial determination about the reliability of the statements. 541 US at 68. Thus, when the declarant is unavailable at trial, the prosecution cannot admit testimonial extrajudicial evidence against the defendant unless the defendant previously had the chance to test its veracity in an adversarial setting. *People v Lewis* (2006) 39 C4th 970, 1028 n19, 47 CR3d 467; see *Crawford v Washington, supra,* 541 US at 68. In so holding, the Court repudiated *Ohio v Roberts* (1980) 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597, which had permitted hearsay evidence in criminal cases if it fell within a traditional hearsay exception or was particularly trustworthy. *Crawford v Washington, supra,* 541 US at 60-65; *People v Lewis, supra,* 39 C4th at 1028 n19.

In *Crawford*, the defendant stabbed a man who allegedly tried to rape his wife. At trial, the state played for the jury the wife's tape-recorded statement to police describing the stabbing, although the defendant had no opportunity for cross-examination. *Crawford v Washington, supra,* 541 US at 38. The wife did not testify at trial because of the Washington state marital privilege, which generally bars a spouse from testifying without the other spouse's consent, but does not apply to out-of-court-statements admissible under a hearsay exception. 541 US at 40. The Court held that admission of the statement without cross-examination violated the Sixth Amendment. 541 US at 68.

Crawford left "for another day" a "comprehensive definition" of "testimonial." 541 US at 68. However, the Court did state that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 US at 68. In *Davis v Washington* (2006) 547 US 813, 126 S Ct 2266, 165 L Ed 2d 224, a consolidation of two domestic violence criminal cases, the Court attempted to clarify the meaning of "testimonial" in the context of statements made by victims during police interrogation. The Court stated that (547 US at 822):

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Thus, the Court, in *Davis*, found that statements of a victim during an emergency call to a 911 operator were not "testimonial," so the tape recording of the call could be heard by the jury without violating the defendant's right to confrontation. 547 US at 826-829. In contrast, in the companion case, *Hammon v Indiana*, the victim's statements to an interrogating officer who arrived on the scene after a domestic altercation was over and the emergency had passed were found to be testimonial. 547 US at 829-830.

After *Crawford,* "nontestimonial" hearsay statements continue to be governed by the *Roberts* standard. In contrast, admission of a "testimonial" hearsay statement constitutes a violation of a defendant's right of confrontation unless the

declarant is unavailable to testify at trial and the defense had a prior opportunity for cross-examination. *People v Corella* (2004) 122 CA4th 461, 467, 18 CR3d 770; see *Crawford v Washington, supra,* 541 US at 59, 68-69. Judges now must decide whether challenged hearsay evidence is "testimonial," with little guidance from the Court. Similarly, there is a lack of clarity regarding the meaning of "unavailable" and "opportunity to cross-examine." Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v Washington, 79 S Cal L Rev 213, 214-215 (November 2005).

In *People v Cage* (2007) 40 C4th 965, 56 CR3d 789, the California Supreme Court, applied the analysis of *Davis* to determine whether statements of a teenage assault victim made in a hospital emergency room addressed to both a police officer and a surgeon were "testimonial" for purposes of the confrontation clause. It held that the victim's statement to a police officer that his mother had slashed him with shard glass, in response to focused police questioning whose primary purpose, objectively considered, was not to deal with an ongoing emergency, but to investigate the circumstances of the crime to establish or prove some past fact, is "testimonial." 40 C4th at 984-986. The court reached a contrary conclusion concerning the victim's statement to his treating surgeon in response to the surgeon's question of "what happened?" The Court found that the primary purpose of the surgeon's question, objectively considered, was not to obtain proof of a past criminal act, or the identity of the perpetrator, for possible use in court, but to deal with a contemporaneous medical situation requiring immediate information about the cause of the victim's wound. 40 C4th at 986-992. The Court summarized the *Davis* decision (40 C4th at 984):

> We derive several basic principles from Davis. First,… the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken primarily for the purpose ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined "objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial. (footnotes omitted).

In *People v Johnson* (2007) 150 CA4th 1467, 1477-1480, 59 CR3d 405, the Sixth District Court of Appeal applied the holding in *Davis* to determine the admissibility of hearsay statements of a prior victim of domestic violence. In *Johnson*, the defendant was charged with several counts of corporal injury on a cohabitant. The prosecution introduced statements of a public safety officer relating a prior incident of domestic violence. The officer responded to a call of domestic violence. He knocked on the door of the residence and heard a woman screaming from the inside. The defendant answered the door, his hands covered with blood. The officer found the screaming woman in the bathroom, located at the back of the residence. He asked the woman "What happened?" She responded that the defendant struck her in the face. The defendant argued that the officer's question to the victim was an attempt to solicit information about past events because there was no ongoing emergency when the officer arrived, the defendant had been separated from the victim, and the victim was in the protective presence of a police officer. The court disagreed, holding that the victim's statement was not testimonial because the circumstances objectively indicated that there was an ongoing emergency, and that the officer obtained information from the victim in order to assess the situation and determine if the victim needed help. 150 CA4th at 1479.

§5.75 b. Forfeiture by Wrongdoing

The Supreme Court has recognized and accepted the doctrine of forfeiture by wrongdoing under which a defendant's Sixth Amendment confrontation rights may be forfeited if his or her wrongdoing caused the witness to be unavailable to testify. *Crawford v Washington* (2004) 541 US 36, 62, 124 S Ct 1354, 158 L Ed 2d 177.

In *People v Giles* (2007) 40 C4th 833, 55 CR3d 133, the California Supreme Court addressed the doctrine of forfeiture by wrongdoing and held that it is not confined exclusively to witness-tampering cases, but also applies when the alleged wrongdoing is the same as the charged offense. The Court found that a defendant convicted of the first-degree murder of his former girlfriend was found to have forfeited his Sixth Amendment right to confrontation concerning the victim's hearsay statements under the doctrine of forfeiture by wrongdoing. After reviewing federal case law on the doctrine, the Court refused to require that defendant, in murdering the victim, intended to prevent the victim's statements from being admitted at an eventual trial. 40 C4th at 840-850. The Court concluded that the doctrine operates regardless of the defendant's intent because it is based on the equitable principle that no person should benefit from his or her wrongful acts. 40 C4th at 849.

On certiorari, the United States Supreme Court disagreed with the California Supreme Court. It concluded that at common law unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying, as in the typical murder case involving accusatorial statements by the victim, the testimony was excluded unless it was confronted or fell within the dying-declaration exception. *Giles v California* (2008) ___ US ___, 128 S Ct 2678, 2684, 171 L Ed 2d 488. The court added that the rule propounded by California Supreme Court was not recognized at common law and not established in American jurisprudence. 128 S Ct at 2687. The court provided guidance on how to approach the doctrine of forfeiture by wrongdoing in domestic violence cases (128 S Ct at 2693):

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution, rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

The fact that a defendant may have motives in addition to preventing a victim from reporting abuse or testifying does not preclude the application of the doctrine. *People v Banos* (2009) 178 CA4th 483, 504, 100 CR3d 476 (defendant killed victim in part to exact revenge).

§5.76 B. Confrontation Clause and State-of-Mind Exception

Statements concerning a victim's state of mind are admissible as an exception to the hearsay rule. Under Evid C §1250, evidence of a statement of the declarant's then-existing state of mind, emotion, or physical sensation is admissible when offered to (1) prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or (2) prove or explain acts or conduct of the declarant. Evid C §1250(a). Included in this provision are statements of intent, plan, motive, design, mental feeling, pain, or bodily health. See Evid C §1250(a). Excluded are statements of memory or belief to prove the fact remembered or believed. Evid C §1250(b).

Such statements are also inadmissible if made under circumstances indicating their lack of trustworthiness. Evid C §1252. For example, courts have found statements made by defendants during postarrest interrogation inadmissible under Evid C §1252, when the defendant had a compelling motive to minimize his or her culpability for the offense, thus indicating a lack of trustworthiness. *People v Jurado* (2006) 38 C4th 72, 129-130, 131, 41 CR3d 319.

In the wake of *Crawford v Washington* (2004) 541 US 36, 62, 124 S Ct 1354, 158 L Ed 2d 177, it would appear that admission of a declarant's extrajudicial statement, if testimonial, is consistent with the confrontation clause only if the defendant had a prior opportunity to cross-examine the declarant. See 541 US at 68; *People v Price* (2004) 120 CA4th 224, 238, 15 CR3d 229 (applying *Crawford* to statement admitted under Evid C §1370). It can be argued, however, that statements concerning a victim's state of mind are not testimonial within the meaning of *Crawford*. See *People v Griffin* (2004) 33 C4th 536, 579 n19, 15 CR3d 743 (statement made by murder victim to friend that defendant was fondling her and that she would confront him was within Evid C §1250 state-of-mind exception and was not testimonial under *Crawford*); see also *Parle v Runnels* (9th Cir 2004) 387 F3d 1030, 1042-1044 (applying California law; testimony by defendant who murdered his wife concerning her alleged threats to kill him was not hearsay when offered to show defendant honestly but unreasonably feared imminent death or great bodily injury).

§5.77 1. When Victim's State of Mind Is in Issue

A victim's statements evidencing fear of the defendant may be admissible under Evid C §1250, subject to the cross-examination requirement of trustworthiness in Evid C §1252 and, if testimonial, to the requirements of *Crawford v Washington* (2004) 541 US 36, 62, 124 S Ct 1354, 158 L Ed 2d 177. However, a prerequisite to this exception is that the victim's mental state or conduct be placed in issue. *People v Guerra* (2006) 37 C4th 1067, 1114, 40 CR3d 118; *People v Hernandez* (2003) 30 C4th 835, 872, 134 CR2d 602. In addition, the victim's extrajudicial declaration must itself be probative on the issue of the declarant's state of mind. Notwithstanding a finding of substantial relevance, the probative value of the statement must still outweigh possible prejudice in accordance with Evid C §352 to be admissible. *People v Crew* (2003) 31 C4th 822, 840, 3 CR3d 733.

For example, in *People v Crew*, a murder prosecution in which defendant was accused of killing his wife, the trial court, under Evid C §1250, properly admitted testimony by a friend of the victim that she should send for the police if she did not hear from the victim within two weeks. The defense had presented the theory that the victim had disappeared of her own accord because she was suffering from stress and depression. The wife's statement thus was admissible as evidence that defendant's wife did not disappear on her own. The court further found that because the testimony was probative on whether the victim's disappearance was of her own volition, its evidentiary value was not substantially outweighed by the danger of undue prejudice under Evid C §352. 31 CA4th at 840.

Similarly, in a first-degree murder case, the deceased wife's statements to a witness were admissible hearsay under Evid C §1250 to refute defendant-husband's trial testimony that the victim was the aggressor, because she had kicked him, challenged him, and insulted him in a provocative way on the night she was killed. *People v Escobar* (2000) 82 CA4th 1085, 1103-1104, 98 CR2d 696. Three weeks before the murder, the victim told a co-worker that she wanted a divorce, but was afraid of her husband because he had threatened to kill her if she left him. 82 CA4th at 1092. The court found these statements admissible under Evid C §1250 as evidence of the victim's fear of defendant and as a refutation that she would have made the bold, insulting comments defendant had claimed. 82 CA4th at 1104. Because the co-worker had approached the victim and had no reason to manufacture evidence, the statements were found trustworthy under Evid C §1252. 82 CA4th at 1105.

In *People v Ortiz* (1995) 38 CA4th 377, 390-394, 44 CR2d 914, the trial court properly admitted statements made by the decedent-victim to show her state of mind under Evid C §1250, namely that she was very angry with the defendant and that he had tried to rape her in the past.

§5.78 2. When Victim's State of Mind Is Not in Issue

Courts have excluded expressions of the victim's fear of defendant when the victim's state of mind was not in issue. For example, in *People v Ireland* (1969) 70 C2d 522, 75 CR 188, in which the defendant was being prosecuted for murdering his wife, the court held inadmissible the victim's statement to a neighbor that, "I know he's going to kill me; I wish he would hurry up and get it over with." 70 C2d at 528. The prosecution asserted that the statement tended to rebut an inference raised by defendant's testimony that the deceased may have been the aggressor. That testimony, however, referenced an argument four years prior to the murder. There was uncontradicted evidence that the victim was reclining on the couch when defendant shot her, and thus there was no issue of self-defense, accident, or suicide. 70 C2d at 530-531.

In *People v Talle* (1952) 111 CA2d 650, 668, 245 P2d 633, the trial court committed prejudicial error in receiving a typed, unsigned statement, written by the wife-decedent four months before her death, in which she stated that the defendant had used physical force on her and had threatened to kill her. The victim's state of mind was not in issue because there was no claim of self-defense, provocation, or suicide. 111 CA2d at 669. Additionally, the statement was self-serving because it was written at the suggestion of her divorce lawyer in an action for separate maintenance. 111 CA2d at 666, 671. Similarly, in *People v Jablonski* (2006) 37 C4th 774, 818-821, 38 CR3d 98, in which defendant was convicted of the murders of his wife and mother-in-law, the trial court erroneously, though harmlessly, admitted statements made by the victims to others regarding their fear of defendant under the state-of-mind exception, when the victims' states of mind were not at issue.

In two domestic violence, first-degree murder cases, *People v Bunyard* (1988) 45 C3d 1189, 249 CR 71, and *People v Ruiz* (1988) 44 C3d 589, 244 CR 200, admission of statements of the victim's fear of the defendant was held to be harmless error. In *Ruiz,* evidence of the fear all three victims (two wives and a stepson) felt toward the defendant was admitted to show the declarants' state of mind, which was not in issue, and to show the defendant's motive, which was an improper use of the statements. 44 C3d at 607-608. The prosecution and trial court had incorrectly relied on *People v Merkouris* (1959) 52 C2d 672, 344 P2d 1, which held that evidence of a victim's fear of defendant was admissible to show that the defendant had engaged in threatening conduct and had later carried out those threats. However, this case was legislatively overruled in 1965 when the California Legislature enacted Evid C §1250. *People v Ruiz, supra*, 44 C3d at 609, citing Law Revision Commission Comments to Evid C §1250 (specifically repudiating *Merkouris* doctrine because it undermines hearsay rule itself). The admission in *Ruiz* was held harmless error because the court gave a limiting instruction, and because the defense challenged only the sufficiency of the prosecution's case. 44 C3d at 609-610.

In *People v Bunyard, supra,* the defendant's conviction for hiring someone to murder his wife and full-term healthy fetus was upheld in spite of the improper admission of statements the wife made to her physician during a routine examination shortly before her death. 45 C3d at 1203-1205. In response to questioning by the doctor as to the cause of bruises, the wife said that her husband had assaulted her on several occasions. 45 C3d at 1203-1204. The appellate court held this statement irrelevant, because the victim's mental state, her conduct, and her medical treatment were not in issue. 45 C3d at 1204-1205. This was harmless error, however, when both her daughter and the defendant testified that the defendant had often struck his wife. 45 C3d at 1205. The doctor also testified that he had suggested to the victim that she call the police, to which the victim responded, "If I did anything like that, he'd kill me." 45 C3d at 1204. Admission of this testimony was found to be harmless error because there was no indication that the victim had called the police, or that the defendant thought she had, or any inference that the defendant killed her to keep her from calling the police. Additionally, the prosecution did not rely on this statement to argue premeditation. 45 C3d at 1205.

§5.79 3. Rebuttal of Self-Defense Claim

Courts have admitted declarations of the victim's fear in homicide cases when the defendant claimed self-defense. For example, in *People v Atchley* (1959) 53 C2d 160, 346 P2d 764, defendant claimed self-defense in a first-degree murder prosecution for the death of his wife. The defendant introduced testimony that the victim had said she wished to kill him, had threatened him with a gun, and was violent and combative. 53 C2d at 167. On rebuttal, the prosecution introduced a letter that the victim had written two days before she was killed, in which she wrote that the defendant had threatened her and that she was afraid of him. Admission of the letter was upheld on appeal as relevant to the declarant's state of mind after being put in issue by the self-defense claim. 53 C2d at 171-172.

Similarly, in *People v Spencer* (1969) 71 C2d 933, 80 CR 99, a domestic violence homicide case involving two lesbians, the defendant claimed self-defense. 71 C2d at 945. A statement by the victim to a friend on the day of her death that she was going to break off the relationship and "might get killed over it" was thus found admissible to negate the defendant's assertion that the victim was the aggressor and that she acted in self-defense. 71 C2d at 944-946.

People v Pinn (1971) 17 CA3d 99, 94 CR 741, involved the second-degree murder of a woman who apparently was the defendant's girlfriend. The court held admissible the testimony of the decedent's nephew that the victim told him on the morning of her death that the defendant was going to kill her, and she wanted to get into the house to get clothes and find her grandmother's gun. 17 CA3d at 103. Defendant contended that the victim had willingly accompanied him to the remote location where she was killed, and she had engaged in consensual sex with him there. The nephew's testimony thus helped to explain the victim's later conduct of taking an overdose of barbiturates at the defendant's insistence and accompanying him to the place where she was killed. 17 CA3d at 105. The statement also provided a basis for the inference that the victim probably repelled the defendant's advances and he then attacked her. 17 CA3d at 105-106.

4. Establishing Defendant's State of Mind

§5.80 a. Introduced by Defense

In *People v Thurmond* (1985) 175 CA3d 865, 221 CR 292, an attempted murder case, the defendant was prosecuted for shooting his lover as she entered the bedroom one night. He claimed he had his gun at the ready to defend himself from an unknown intruder, possibly the victim's husband, and the gun went off accidentally. 175 CA3d at 868, 871. The appellate court held that the trial court erred in refusing to admit defendant's testimony to prove his state of mind regarding his lover's husband at the time of the shooting, which was relevant to his defense of accident or misfortune. 175 CA3d at 871-872. The error was prejudicial because accident was defendant's sole defense. 175 CA3d at 872.

§5.81 b. Introduced by Prosecution

In *People v Cartier* (1960) 54 C2d 300, 5 CR 573, the defendant was convicted of the particularly brutal first-degree murder of his wife. The trial court properly admitted testimony that a witness had seen the victim run onto her porch six weeks before her death and saw defendant chase and pull her back into the house. The court of appeal held that evidence tending to establish prior quarrels between defendant and decedent and the making of threats by defendant is properly admitted and is competent to show the motive and state of mind of defendant. 54 C2d at 311.

In *People v Smith* (2003) 30 C4th 581, 613, 134 CR2d 1, evidence that defendant owned a derringer and ammunition apart from the weapon used in the murder of a foreign exchange student was properly admitted to show defendant's state of mind when he shot the victim. Defendant claimed the shooting was an accident, that he did not intend to kill the victim, and that he only took the gun to intimidate her. 30 C4th at 613-614. The court concluded that evidence that defendant possessed another small, easily concealed, but unloaded, gun and no ammunition that fit it and that he chose instead to take a loaded gun was relevant to defendant's state of mind at the time he shot the victim and also to his credibility as a witness. 30 C4th at 613-614.

See also *People v Karis* (1988) 46 C3d 612, 634-637, 250 CR 659, a non-domestic violence case involving kidnapping, rape, murder, and attempted murder, in which the defendant's statement to a third party three days before the crimes was admissible under Evid C §1250. In the statement, defendant said that he could understand that if someone committed a serious crime, it could be necessary to have a gun to kill witnesses and avoid apprehension. He also stated that he thought rape was a serious crime. 46 C3d at 626.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.82 C. Victim's Excited Utterances, Spontaneous Statements

§5.82 C. Victim's Excited Utterances, Spontaneous Statements

After an assault, domestic violence victims often make spontaneous statements or excited utterances. Such statements may be admissible under Evid C §1240, and may be offered to prove the existence of an event, to show that the declarant witnessed it, and to identify the assailant. *People v Hughey* (1987) 194 CA3d 1383, 240 CR 269.

It can be argued that spontaneous declarations by an unavailable victim are not testimonial, so that their admission in evidence under Evid C §1240 does not violate defendant's right of confrontation under *Crawford v Washington* (2004) 541 US 36, 68, 124 S Ct 1354, 158 L Ed 2d 177. See, *e.g.*, *People v Corella* (2004) 122 CA4th 461, 464, 18 CR3d 770 (spontaneous declaration in 911 tapes by wife in corporal injury case was not testimonial and did not violate Sixth Amendment); for further discussion, see §5.87.

§5.83 1. General Grounds for Admissibility

To be admissible as a spontaneous statement or excited utterance under Evid C §1240, there must be a showing that the statement (1) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (2) was made spontaneously while the declarant was under the stress of excitement caused by such perception. For purposes of the exception, a statement may qualify as spontaneous if it is undertaken without deliberation or reflection. *People v Morrison* (2004) 34 C4th 698, 718, 21 CR3d 682. Although responses to detailed questioning are likely to lack spontaneity, an answer to a simple inquiry may be spontaneous. 34 C4th at 718-719.

The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is not the nature of the statement but the mental state of the speaker. The nature of the utterance —for example, how long it was made after the startling incident and whether the speaker blurted it out—may be important, but only as an indicator of the declarant's mental state. *People v Brown* (2003) 31 C4th 518, 541, 3 CR3d 145. The trial court must consider each fact pattern on its own merits and is vested with reasonable discretion in the matter. *People v Morrison, supra,* 34 C4th at 719; *People v Brown*, *supra,* 31 C4th at 541.

§5.84 2. Declarant's Physical Pain

In *People v Farmer* (1989) 47 C3d 888, 254 CR 508, disapproved on other grounds in 22 C4th 690, 724 n6, the court held that the statements of the dying victim to a police dispatcher and later to a police investigator were spontaneous because of the intense pain of his gunshot wounds and the victim's concern for his survival, which so preoccupied him that he could not have contemplated spinning a false tale. *People v Farmer, supra,* 47 C3d at 904. The court noted (47 C3d at 901 n1):

> The statute speaks of excitement caused by the perception of an event. A literal reading of this language conceivably might limit spontaneous declarations to psychic stress caused by observing an event, excluding the physical stress or pain experienced by participants. This is plainly not what was meant; spontaneous statements have traditionally included both types of excitement.

The same conclusion was reached in *People v Jones* (1984) 155 CA3d 653, 202 CR 289, in which a doctor was allowed to testify at trial that the dying victim told him that defendant had poured gasoline on him. 155 CA3d at 658. At the time the victim made the statements to the doctor, 30 to 40 minutes after his injury, he was in pain, although he had been given a pain killer, and was in psychological shock. 155 CA3d at 662.

§5.85 3. Time Between Event and Statement

The time between the event and the statement is important because the declarant must still be under the stress of excitement caused by the exciting event. However, lapse of time between the described event and the statement, though a factor in determining spontaneity, is not dispositive. The crucial element in determining whether a declaration is sufficiently reliable to be admissible under Evid C §1240 is the mental state of the speaker. *People v Brown* (2003) 31 C4th 518, 541, 3 CR3d 145. Thus, the amount of time between the event and the declaration does not deprive the statement of spontaneity if it appears that they were made under the stress of excitement and while the declarant's reflective powers are still in abeyance. *People v Poggi* (1988) 45 C3d 306, 319, 246 CR 886; see *People v Brown, supra,* 31 C4th at 526, 541 (trial court properly admitted witness's testimony that she heard brother-in-law say, "I know [defendant] shot her. I know she is hurt bad," under Evid C §1240, although statement was made over two hours after crime, when brother-in-law was upset, crying, and shaking at time of statement); *People v Saracoglu* (2007) 152 CA4th 1584, 1588-1590, 62 CR3d 418 (victim's statements made to police on arriving at police station 30 minutes after an assault were properly admitted; victim was distraught and fearful when she made the statements).

In *People v Jones* (1984) 155 CA3d 653, 662, 202 CR 289, the statement was admissible even though it was made 30 to 40 minutes after the event. Longer delays have been tolerated, especially when the declarant was unconscious between the time of the event and the time of making the statement. See, *e.g.*, *People v Washington* (1969) 71 C2d 1170, 81 CR 5 (declarant unconscious for over an hour, then made admissible statement).

In *People v Trimble* (1992) 5 CA4th 1225, 1234-1235, 7 CR2d 450, the court upheld admission of hearsay statements of a two-and-one-half-year-old child, made nearly two days after the event, implicating her father in the murder of her mother. The child had made the statements to her maternal aunt the first time they were alone together. The aunt testified that the child became hysterical as soon as they were alone and related the incident. 5 CA4th at 1229-1230, 1235. The child was too terrified to testify at trial. 5 CA4th at 1233 n4. The court found that the lapse of time was not determinative, since the statement was spontaneous and uttered in the stress of nervous excitement, and was surrounded by indicia of reliability. 5 CA4th at 1235-1236.

§5.86 4. Statements Made in Response to Questioning

Spontaneous statements may be admissible even when they are made in response to questioning when it appears that they were made under the stress of excitement and while the reflective powers were still in abeyance. *People v Washington* (1969) 71 C2d 1170, 81 CR 5. The fact that a statement is made in response to questioning is only one factor suggesting the answer may be the product of deliberation. It does not automatically deprive the statement of spontaneity. *People v Farmer* (1989) 47 C3d 888, 903, 254 CR 508, disapproved on other grounds in 22 C4th 690, 724 n6.

An answer to a simple inquiry has been held to be spontaneous. *People v Morrison* (2004) 34 C4th 698, 718-719, 21 CR3d 682; *People v Farmer, supra,* 47 C3d at 904. More detailed questioning, in contrast, may deprive the response of the requisite spontaneity. 47 C3d at 904. In addition, *Crawford v Washington* (2004) 541 US 36, 51, 124 S Ct 1354, 158 L Ed 2d 177, distinguishes an "off-hand, overheard remark" from "the civil-law abuses" targeted by the Sixth Amendment confrontation clause.

In *People v Roybal* (1998) 19 C4th 481, 79 CR2d 487, the trial court properly admitted tape recordings of the 911 call made by a murder victim's husband within minutes of finding her body, and an interview with the investigating police officer "on the heels of the 911 call," as spontaneous utterances. 19 C4th at 508-509. Although the recordings reveal that the husband responded to several questions posed to him by dispatchers and by the investigating officer, his statements clearly purport to describe a condition he perceived, and they were made in the immediate aftermath of finding his wife's body. 19 C4th at 509.

In *Farmer*, two statements were made by the victim in response to questioning, first by the police dispatcher over the phone, and then by the responding officer. 47 C3d at 901-903. The court reasoned that both statements were admissible as spontaneous utterances when the declarant was distraught and in severe pain at the time; his responses to the questions, which were not suggestive, were not self-serving; and the pain of his wounds and his concern for survival preoccupied him so that he could not have contemplated telling falsehoods. 47 C3d at 904.

§5.87 5. Tape Recordings of Telephone Calls to Police

Tape recordings of phone calls to the police have been held admissible as spontaneous statements or excited utterances. See, *e.g.*, *People v Byron* (2009) 170 CA4th 657, 675-676, 88 CR3d 386; *People v Brenn* (2007) 152 CA4th 166, 171-178, 60 CR3d 830; *People v Corella* (2004) 122 CA4th 461, 18 CR3d 770. Thus, when a domestic violence victim has called law enforcement authorities to report the crime while still experiencing physical or psychic pain from the assault, tape recordings of such a statement may be admissible under Evid C §1240, depending on the circumstances of the case.

For example, in *People v Corella,* a corporal injury case, admission of a tape recording of the wife's 911 call to the police and her statements to the investigating police officer were properly admitted as spontaneous statements and did not violate defendant's right of confrontation because the statements qualified as spontaneous and were not testimonial under *Crawford v Washington* (2004) 541 US 36, 68, 124 S Ct 1354, 158 L Ed 2d 177. *People v Corella, supra,* 122 CA4th at 464. The wife's statements that she hid the car keys to prevent defendant from leaving home in an intoxicated state described the event that culminated in and was closely connected to defendant's violence. The statements also provided an unreflective explanation of her perception of the reasons why her husband hit her. However, her statements that defendant was smoking marijuana and was on probation did not "narrate, describe, or explain" the commission of the offense or any relevant circumstance under which the offense was committed. 122 CA4th at 466. Admission of these statements was harmless error. 122 CA4th at 466-467.

In addition, the court concluded that spontaneous statements made by a wife in a 911 telephone call and in speaking with the investigating officer who responded to the 911 call were not testimonial because they were not knowingly given in response to structured police questioning, and they bear no indicia common to the official and formal quality of the statements deemed testimonial by *Crawford*. A victim making a 911 call is in need of assistance, while the operator is determining the appropriate response. The operator is not conducting a police interrogation in contemplation of a future prosecution. 122 CA4th at 468.

The court further held that the wife's spontaneous statements to the investigating officer describing what had just happened did not become part of a police interrogation merely because the person to whom the statements were made was a police officer obtaining information from a victim. Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an "interrogation." Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford*. *People v Corella, supra,* 122 CA4th at 469, citing *Crawford v Washington, supra,* 541 US at 51-52.

In *Davis v Washington* (2006) 547 US 813, 126 S Ct 2266, 165 L Ed 2d 224, the Supreme Court held that statements of a victim during an emergency call to a 911 operator were not "testimonial," so the tape recording of the call could be heard by the jury without violating the defendant's right to confrontation. 547 US at 826-829. See discussion in §5.74.

§5.88 6. Spontaneous Statements Admissible Even When Witness Available

For a spontaneous statement to be admissible, the witness does not have to be unavailable. *People v Hughey* (1987) 194 CA3d 1383, 240 CR 269; see Evid C §1240 (no unavailability requirement). In *Hughey,* a domestic violence case, the defendant was convicted of assaulting his wife under Pen C §240 and of endangering their child under Pen C §273(a). 194 CA3d at 1386. The wife was subpoenaed by the prosecution and was present in court, but was not called to testify by either party. 194 CA3d at 1388. Instead, one of the responding police officers testified to the victim's spontaneous statements. 194 CA3d at 1387. In these statements, the victim was screaming for help when the officers arrived, then told the officers after exiting her house that she had been struck by defendant, who had also tried to smother their three-month-old daughter. At the victim's residence three or four minutes later, the officers asked the wife about the events, and she stated that the defendant grabbed her around the neck, hit her breast with his elbow, repeatedly threw her against the wall heater, causing her to strike her head on a bed post, and kicked her in the stomach. 194 CA3d at 1388.

The defendant argued on appeal that the statements were inadmissible because they were not spontaneous. The court disagreed, holding that "all [the victim's] statements had the indicia of reliability to qualify as spontaneous statements," in that they described a startling event and were made under the excitement of that event. The fact that the victim was screaming for help as the officers arrived clearly indicated that "the few minute interval between the time of the assaults and the statements did not destroy their spontaneity." 194 CA3d at 1388.

When the declarant is available to testify at trial and to be cross-examined, there is no Sixth Amendment confrontation clause issue in the use of the declarant's out-of-court spontaneous utterances for the truth of the matter asserted. *People v Rincon* (2005) 129 CA4th 738, 755, 28 CR3d 844; see *Crawford v Washington* (2004) 541 US 36, 59 n9, 124 S Ct 1354, 158 L Ed 2d 177. When the declarant is unavailable at trial, however, the prosecution cannot admit extrajudicial testimonial statements against the defendant unless the defendant previously had the chance to test the statements' veracity in an adversarial setting through cross-examination. See 541 US at 68; *People v Lewis* (2006) 39 C4th 970, 1028 n19, 47 CR3d 467 (prior inconsistent statements).

§5.89 D. Extrajudicial Complaint Evidence

Under the common law fresh-complaint doctrine, evidence that an alleged victim of a sexual offense disclosed or reported the incident to another person shortly after its occurrence is admissible in a subsequent criminal prosecution for that offense. *People v Brown* (1994) 8 C4th 746, 748, 35 CR2d 407. Historically, a victim's extrajudicial complaint was admissible for the nonhearsay purpose of establishing that a complaint was made, to forestall the trier of fact from incorrectly inferring that no complaint was made, and thus concluding that the victim was not sexually assaulted. 8 C4th at 748-749; see, *e.g.*, *People v Burton* (1961) 55 C2d 328, 351, 11 CR 65. Such extrajudicial statements have also been admitted under an exception to the hearsay rule, such as a spontaneous utterance under Evid C §1240, or as evidence of prior identification under Evid C §1238. *People v Brown, supra,* 8 C4th at 749 n1. However, a major premise of the fresh complaint doctrine—that it is natural for the victim of a sexual offense to promptly disclose the incident if it occurred—has been discredited. 8 C4th at 749, 757-759.

Accordingly, the doctrine has been revised to provide that proof of an extrajudicial complaint by the victim of a sexual offense disclosing the alleged assault is admissible for a limited nonhearsay purpose of establishing the fact of, and circumstances surrounding, the victim's disclosure of the assault to others, when relevant to the fact finder's determination as to whether the offense occurred. 8 C4th at 749-750, 759-760. Admissibility of such evidence no longer turns on whether the victim's complaint was made immediately following the alleged assault or was delayed, or on whether the complaint was volunteered spontaneously by the victim or was prompted by questions from another person. 8 C4th at 750, 763. These are among the factors to be considered by the factfinder in assessing the significance of the victim's statements in conjunction with all other evidence presented. 8 C4th at 763.

The specific relevance of extrajudicial-complaint evidence must be shown in every case. 8 C4th at 763; see Evid C §210. In addition, even if relevant, the evidence is subject to exclusion under Evid C §352 if the probative value of the evidence is outweighed by the risk of prejudice from its admission. 8 C4th at 763. Ordinarily, only the fact that a complaint was made, and the circumstances surrounding its making are admissible, since admission of evidence concerning details of the statements to prove the truth of the matter asserted would violate the hearsay rule. 8 C4th at 760, 764.

Extrajudicial-complaint evidence is commonly offered in sexual abuse cases, frequently with child victims who make the complaint to a parent or other adult. Such evidence should be received in domestic violence cases, as in sexual assault cases, as long as it meets the standards generally applicable to determine evidentiary relevance and admissibility. See 8 C4th at 749-750.

§5.90 E. Prior Inconsistent Statements

The issue of using prior inconsistent statements to impeach a witness often arises in domestic violence cases, when victims may recant or minimize past statements regarding what happened to them. Under Evid C §1235, evidence of a statement made by a witness is not inadmissible under the hearsay rule if the statement is inconsistent with the witness's testimony at the hearing, provided the witness is given the opportunity to explain or deny the statement in compliance with Evid C §770. *People v Ledesma* (2006) 39 C4th 641, 710, 47 CR3d 326. Because Evid C §§1235 and 770 require that the declarant be available to testify at trial, Sixth Amendment confrontation clause issues should not be an issue. See *Crawford v Washington* (2004) 541 US 36, 59 n9, 124 S Ct 1354, 158 L Ed 2d 177 (when declarant appears for cross-examination at trial, confrontation clause places no constraints on use of his or her prior testimonial statements).

Normally, testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. *People v Ledesma, supra,* 39 C4th at 710; *People v Green* (1971) 3 C3d 981, 988, 92 CR 494. However, when a witness's claimed lack of memory amounts to deliberate evasion, inconsistency is implied. *People v Ledesma, supra,* 39 C4th at 710; *People v Green, supra,* 3 C3d at 988-989. As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. The requisite finding is implied from the trial court's ruling. *People v Ledesma, supra,* 39 C4th at 710; see Evid C §402(c).

The fact that a victim admits at trial to having made prior statements, and testifies that they were lies, does not change the inconsistent character of the prior statements. *People v Brown* (1995) 35 CA4th 1585, 1597, 42 CR2d 155. In *Brown*, the defendant was convicted of assault of his former girlfriend, and the second-degree murder of her eight-month-old fetus. At the hospital after the assault, the victim consistently told several people, including her mother, doctor, friends, and police officers, that defendant had beaten and kicked her in the abdomen. 25 CA4th at 1590. However, by the time of trial, the victim and defendant were again living together. She testified at trial that she had provoked a fight with defendant, who had fallen on her during their fight. The victim also testified that her prior accusations against defendant were lies she had told because she was hurt by rumors he had been "messing around." 25 CA4th at 1591. The trial court then properly permitted the prosecutor to cross-examine the victim about her prior statements, and to present the statements through the testimony of those to whom she had made them. 25 CA4th at 1596, 1597.

In *People v Zapien* (1993) 4 C4th 929, 952, 955, 17 CR2d 122, the court held that multiple hearsay is admissible when each hearsay level constitutes a witness's prior inconsistent statement, provided each witness is present in court and subject to cross-examination. In this case, one of defendant's nieces, Inez, told her sister Juanita that Inez had seen their uncle with blood on his hands and clothing on the morning after the murder, and that he had admitted committing the murder. Juanita related to a friend what her sister had told her. At trial, the two sisters denied making these statements, and the friend denied that Juanita had told her what Inez said, although the friend had provided the prosecution with tape-recorded statements as to what Juanita had told her. 4 C4th at 950. The prosecution then played the tape-recorded statement of the friend relaying the earlier statements of Inez and Juanita. 4 C4th at 951. In each instance, there was evidence of the prior inconsistent statements of the witnesses. 4 C4th at 953.

F. Exceptions When Witness Unavailable

§5.91 1. Right of Confrontation

A witness's unavailability at trial raises Sixth Amendment right of confrontation issues. See also Pen C §686(3). When a witness is unavailable at trial, the prosecution cannot admit that witness's extrajudicial testimonial statements against the defendant unless the defendant previously had the chance to test the statements' veracity in an adversarial setting through cross-examination. *Crawford v Washington* (2004) 541 US 36, 68, 124 S Ct 1354, 158 L Ed 2d 177; see *People v Lewis* (2006) 39 C4th 970, 1028 n19, 47 CR3d 467 (prior inconsistent statements); for further discussion of *Crawford*, see §5.74.

Several exceptions to the hearsay rule are conditioned on the unavailability of the declarant to testify at trial. See, *e.g.*, Evid C §§1291 (former testimony), 1370 (statements concerning physical abuse); for further discussion, see §§5.92-5.93. In light of the Supreme Court's decision in *Crawford*, these exceptions are subject to scrutiny regarding their impact on the defendant's Sixth Amendment confrontation rights. If they meet or can be harmonized with the requirements of the confrontation clause as interpreted by *Crawford v Washington*, they can continue to be relied on as valid exceptions to the hearsay rule. See, *e.g.*, *People v Price* (2004) 120 CA4th 224, 238-239, 15 CR3d 229 (interpreting trustworthiness prong of Evid C §1370(a)(4) to require prior opportunity to cross-examine declarant); for further discussion, see §5.92.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.92 2. Statements Concerning Physical Abuse

§5.92 2. Statements Concerning Physical Abuse

Evidence Code §1370 currently provides that a statement that is made by an unavailable witness that narrates, describes, or explains the infliction or threat of physical injury on the declarant, and that is made at or near the time of the infliction or threat of physical injury is not inadmissible under the hearsay rule if certain other conditions apply. See Evid C §1370(a)(1), (3); see Evid C §240 (defining "unavailable"). The statement must have been made within five years of the filing of the criminal proceeding. Evid C §1370(a)(3). It also must have been made in writing, recorded electronically, or made to a physician, nurse, paramedic, or to a law enforcement official. Evid C §1370(a)(5).

In addition, the statement must be made under circumstances that indicate its trustworthiness. Evid C §1370(a)(4). Factors relevant to this determination are listed in Evid C §1370(b). Moreover, the proponent of the statement must notify the adverse party of the intent to offer the statement within a sufficient amount of time before the proceedings to allow the party to prepare to meet the statement. Evid C §1370(c).

Before the Supreme Court decision in *Crawford v Washington* (2004) 541 US 36, 62, 124 S Ct 1354, 158 L Ed 2d 177, Evid C §1370 was upheld as constitutional under both the Fifth Amendment due process clause and the Sixth Amendment confrontation clause. *People v Hernandez* (1999) 71 CA4th 417, 422-424, 83 CR2d 747. The court of appeal found that Evid C §1370 does not deny a defendant due process, because both the defendant and prosecution may invoke the statute to the same extent. 71 CA4th at 422-423. The court further held that the statute does not violate the confrontation clause because it contains particularized guarantees of trustworthiness and adequate indicia of reliability by requiring the statement (1) to be made at or near the time of the incident by a person who experienced the incident firsthand under circumstances indicating its trustworthiness, and (2) to have been recorded in writing or electronically, or to have been made to a police officer. 71 CA4th at 424.

In essence, *Hernandez* found that Evid C §1370 passed muster under the confrontation clause because it offers a particularized guaranty of trustworthiness or adequate indicia of reliability as required by the now-repudiated decision in *Ohio v Roberts* (1980) 448 US 56, 66, 100 S Ct 2531, 65 L Ed 2d 597. See *People v Hernandez, supra,* 71 CA4th at 424. To be applicable as an exception to the hearsay rule, Evid C §1370(a)(4) requires that the statement be made under circumstances indicating its trustworthiness. After *Crawford*, admission of a declarant's extrajudicial statement, if testimonial, would be consistent with the confrontation clause only if the defendant had a prior opportunity to cross-examine the declarant. *People v Price* (2004) 120 CA4th 224, 238, 15 CR3d 229; see *Crawford v Washington, supra,* 541 US at 68. Noting that courts must construe statutes in a manner consistent with applicable constitutional provisions and must seek to harmonize the Constitution and the statute, the court in *People v Price* interpreted the trustworthiness prong of Evid C §1370(a)(4) to require a prior opportunity to cross-examine the declarant. *People v Price, supra,* 120 CA4th at 238-239.

In *Price*, a corporal injury and assault case, the defendant complained that the trial court erred in admitting a prior out-of-court statement given to the police by the victim, his wife, about 30 minutes after the police responded to a 911 call from the defendant's residence. 120 CA4th at 228-229. At a preliminary hearing before trial, defendant had the opportunity to cross-examine the victim about the statement she gave to police. However, when the victim was called to testify at trial, she refused to answer most substantive questions about the alleged crimes. 120 CA4th at 233. The trial court then admitted the investigating police officer's testimony regarding the victim's out-of-court statement, apparently under Evid C §1370. 120 CA4th at 237. The court of appeal noted that not only had defendant had an opportunity to cross-examine his wife about her prior statement during the preliminary hearing, he later presented that preliminary hearing testimony to the jury in support of his defense. Accordingly, the court found *Crawford* inapplicable to the victim's prior statement to police and upheld admission of the officer's testimony at trial. 120 CA4th at 240-241.

In *People v Williams* (2002) 102 CA4th 995, 1004, 1005, 1007-1009, 125 CR2d 884, a trial court did not violate the defendant's confrontation rights by permitting a domestic violence victim suffering from physical disabilities, depression, and posttraumatic stress to testify by means of videotape rather than declaring the witness unavailable and admitting her prior testimony under Pen C §1370. In *Williams*, the court had the witness's courtroom testimony videotaped without the jury present, while defendant remained in a wired detention cell so he could hear the testimony. Defense

counsel was able to confer with defendant before ending cross-examination. The videotape was then played for the jury with defendant present in the courtroom. 102 CA4th at 1006.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.93 3. Former Testimony

§5.93 3. Former Testimony

Under Evid C §1291, former testimony of an unavailable witness can be admissible under the hearsay rule if offered against a person who offered it in evidence on his or her own behalf on the prior occasion. See Evid C §1291(a)(1). Similarly, former testimony is admissible if the declarant is unavailable as a witness, and the party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he or she has at the hearing. Evid C §1291(a)(2). Thus, for example, former testimony given by a witness at a preliminary hearing may be offered at trial as an exception to the hearsay rule under Evid C §1291(a)(2), provided the witness is unavailable to testify, and the party opposing its admission had an opportunity to cross-examine the declarant at the time the evidence was offered.

However, to avoid running afoul of the Sixth Amendment confrontation clause, testimonial statements of witnesses absent from trial are admissible only when the declarant is unavailable, and only when the defendant has had a prior opportunity to cross-examine witnesses. *Crawford v Washington* (2004) 541 US 36, 59, 124 S Ct 1354, 158 L Ed 2d 177; *People v Wilson* (2005) 36 C4th 309, 341, 30 CR3d 513. Under *Crawford*, a prior opportunity to cross-examine a witness is "dispositive" of the admissibility of his testimonial statements. *Crawford v Washington, supra,* 541 US at 55-56. As long as a defendant is given the opportunity for effective cross-examination, the statutory requirements of Evid C §1291 are satisfied.

Admissibility of former testimony under Evid C §1291 does not depend on whether defendant fully availed himself or herself of that opportunity. For example, admission of such testimony does not offend the confrontation clause simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective. *People v Wilson, supra,* 36 C4th at 346. Similarly, the fact that defense counsel chose not to cross-examine a victim during his or her former testimony is irrelevant for purposes of Evid C §1291, as long as there was an opportunity to cross-examine. *People v Stritzinger* (1983) 34 C3d 505, 515-516, 194 CR 431.

In addition, when a defendant has had an opportunity to cross-examine a witness at the time of the witness's prior testimony, that testimony will be deemed sufficiently reliable to satisfy the confrontation requirement, regardless of whether subsequent circumstances bring into question the accuracy or completeness of the prior testimony. *People v Wilson, supra,* 36 C4th at 346. In an "extraordinary" case, as for example, when a court has determined that a defendant received ineffective representation from trial counsel, it is necessary to explore the character of the actual cross-examination to ensure defendant has been afforded an adequate opportunity for full cross-examination. 36 C4th at 346-347, citing *Ohio v Roberts* (1980) 448 US 56, 73 n12, 100 S Ct 2531, 65 L Ed 2d 597. Absent such unusual circumstances, no inquiry into effectiveness is required. *People v Wilson, supra,* 36 C4th at 347.

A defendant's interest and motive at a second proceeding is not dissimilar to his or her interest at a first proceeding within the meaning of Evid C §1291(a)(2) simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain ways. *People v Harris* (2005) 37 C4th 310, 333, 33 CR3d 509; *People v Alcala* (1992) 4 C4th 742, 784, 15 CR2d 432. The motives for cross-examination need not be identical, only similar. *People v Harris, supra,* 37 C4th at 333; *People v Samayoa* (1997) 15 C4th 795, 850, 64 CR2d 400.

For example, in *People v Ogen* (1985) 168 CA3d 611, 616-617, 215 CR 16, the court of appeal rejected an argument that a victim's preliminary hearing testimony in a rape and kidnapping case should not have been introduced against him in his murder trial, because the crimes were different, thus denying his right to confrontation. In *Ogen*, the defendant kidnapped his former girlfriend at gunpoint, rebuked her for seeing other men, threatened to kill her and himself, then raped her. Defendant was arrested for those crimes but continued to make threatening phone calls to the victim. At the preliminary hearing, the victim testified to all the above, and to defendant's history of physical assaults on and threats to kill her if she continued rejecting him. Defense counsel extensively cross-examined her during the hearing. After defendant was released on bail with admonishments from the court not to contact the victim, he killed her. 168 CA3d at 615. The appellate court upheld admission of the victim's former testimony, holding that the defendant

had a similar interest and motive in both proceedings: to undermine the victim's credibility and exploit weaknesses in her testimony bearing on his culpability. 168 CA3d at 617.

§5.94 4. When Declarant Is Unavailable

Evidence Code §240 defines when a person is "unavailable as a witness" for purposes of hearsay exceptions requiring unavailability as a prerequisite to applicability. See, *e.g.*, Evid C §§1291, 1370. In general, "unavailable as a witness" means that the declarant is (Evid C §240(a)):

(1) Exempted or precluded from testifying on the ground of privilege on the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or testify because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing, and the court is unable to compel the witness's attendance by its process.

(5) Absent from the hearing, and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure the witness's attendance by the court's process. See *People v Byron* (2009) 170 CA4th 657, 670-674, 88 CR3d 386.

In addition, a witness suffering from physical or mental trauma resulting from an alleged crime such that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute unavailability under Evid C §240(a)(3). See Evid C §240(c); see §5.97.

However, a declarant is not unavailable if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of the evidence for the purpose of preventing the declarant from attending or testifying. Evid C §240(b).

The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable. *People v Smith* (2003) 30 C4th 581, 610, 134 CR2d 1; see Evid C §405. This burden of proof is met by showing the witness's unavailability through a preponderance of the evidence. *People v Winslow* (2004) 123 CA4th 464, 471, 19 CR3d 872. A trial court's determination of unavailability is subject to independent review on appeal. *People v Cromer* (2001) 24 C4th 889, 901, 103 CR2d 23.

§5.95 a. Declarant Deceased

In some cases, the domestic violence victim is unavailable as a witness because the defendant killed him or her. Obviously, a person who is dead is unavailable as a witness under Evid C §240. Evid C §240(a)(3); see *People v Carter* (2005) 36 C4th 1114, 1171-1172, 32 CR3d 759 (admission in non-domestic violence capital murder case of preliminary hearing testimony of deceased woman's boyfriend who died before trial).

However, a declarant is not unavailable under Evid C §240 if the declarant's death was brought about by the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the declarant from attending or testifying. Evid C §240(b).

A deceased victim's dying declaration may also be admissible under that exception to the hearsay rule. See Evid C §1242; *People v Bagwell* (1974) 38 CA3d 127, 132-133, 113 CR 122 (victim stabbed in heart by wife). And the admission of a dying declaration does not violate the Sixth Amendment's confrontation clause. *People v D'Arcy* (2010) 48 C4th 257, 289-292, 106 CR3d 459; *People v Monterroso* (2004) 34 C4th 743, 763-765, 22 CR3d 1.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.96 b. Existing Illness or Infirmity

§5.96 b. Existing Illness or Infirmity

A witness is unavailable under Evid C §240 if he or she is unable to attend or testify because of an existing physical or mental illness or infirmity. Evid C §240(a)(3). When the prosecution bases unavailability of a declarant on a claim of an incapacitating physical or mental condition at the time of trial, the illness or infirmity must be of comparative severity. It must exist to such a degree that it renders the witness's attendance, or his or her testifying, relatively impossible, not merely inconvenient. *People v Winslow* (2004) 123 CA4th 464, 471, 19 CR3d 872; *People v Gomez* (1972) 26 CA3d 225, 230, 103 CR 80. In the context of mental illness or infirmity, the phrase "relatively impossible" to testify does not mean it is impossible to elicit the testimony due to insanity or coma or other total inability to communicate. *People v Winslow, supra,* 123 CA4th at 472-473. Rather, the phrase includes the relative impossibility of eliciting testimony without risk of inflicting substantial trauma on the witness. 123 CA4th at 473.

In *People v Turner* (1990) 219 CA3d 1207, 268 CR 686, disapproved on other grounds in 24 C4th 889, 890, a rape victim was found unavailable when she refused to testify at trial after having testified at two preliminary examinations. 219 CA3d at 1210-1212. The appellate court considered both Evid C §240(a)(3) and (c) in upholding the trial court's finding of unavailability, based on the testimony of a licensed social worker who had treated the witness, had diagnosed her as suffering from rape-induced posttraumatic stress disorder requiring long-term treatment, and had the opinion that testifying again would further harm the witness. 219 CA3d at 1212-1213, 1216.

In *People v Rojas* (1975) 15 C3d 540, 550-552, 125 CR 357, a non-domestic violence assault case, the court found a witness unavailable under Evid C §240(a)(3), holding that his fear for his own safety and the safety of his family rendered him unavailable to testify because of mental infirmity. 15 C3d at 550, 552. *Rojas* involved a witness who had been present in the backseat of his own car when he saw defendant shoot a gun and saw a victim on the ground outside. 15 C3d at 544. The witness testified at the preliminary examination and first trial, but refused to testify at the second trial, even though the court explained that he had been granted immunity and would be held in contempt if he did not testify. In an in camera hearing, the witness stated that he had received threats by letter and telephone, that he had been struck physically on one occasion, that bottles had been thrown at his car, that his father's car had been vandalized, that he was called names at school such as "snitch," and that he feared for his life and that of his family. 15 C3d at 547. There is no mention of any expert testimony regarding the witness's mental state.

In contrast, in *People v Williams* (1979) 93 CA3d 40, 155 CR 414, a rape victim testified at defendant's first trial, but was reluctant to testify at a second trial. At the hearing on her availability, the judge from the first trial testified to her severe emotional strain during the first trial, and the fact that she had collapsed on the first day of trial, possibly because she had colitis. 93 CA3d at 49. Two friends also testified that the victim said she was "being torn apart," and had become hysterical on learning that she had to testify again. 93 CA3d at 50. The trial court determined she was unavailable as a witness under Evid C §240(a)(3), and admitted her former testimony under Evid C §1291. 93 CA3d at 49, 54-55. The court of appeal noted that the prosecution had offered no medical evidence as to the victim's physical and emotional condition at the time of the hearing, or as to the probable effects on her health if she were required to testify. 93 CA3d at 50. In addition, there was no evidence that the victim had absolutely refused to testify. 93 CA3d at 54. Accordingly, the court of appeal found that the trial court had abused its discretion in finding the victim unavailable. 93 CA3d at 54-55.

Similarly, in *People v Stritzinger* (1983) 34 C3d 505, 510, 518-519, 194 CR 431, the appellate court held a trial court's finding of unavailability under Evid C §240(a)(3) an abuse of discretion given the absence of expert testimony that the victim had an illness or infirmity rendering it "relatively impossible" for her to appear at trial. In *Stritzinger*, a minor incest victim refused to testify at trial against her father. At a hearing on the child's unavailability, the only testimony offered was from the child's mother, who testified that the child was under extreme stress, was currently undergoing psychotherapy in a hospital, and had intentionally cut herself two days earlier. 34 C3d at 510, 516. Although the trial court invited the prosecution to offer medical testimony, it failed to do so. 34 C3d at 516. *Stritzinger* distinguished *Rojas,* noting that the witness there had testified at a hearing regarding his fear of testifying at trial as a result of the threats against him and his family, whereas in *Stritzinger,* only the mother had testified, so that the child's

subjective fear had not been established by the evidence. 34 C4th at 518-519.

§5.97 c. Physical Inability To Testify or Substantial Trauma From Alleged Crime

Expert testimony establishing that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability under Evid C §240(a)(3). Evid C §240(c). This provision adds crime-induced physical and mental trauma as a reason why a declarant may be unavailable as a witness. *People v Winslow* (2004) 123 CA4th 464, 473, 19 CR3d 872. Under Evid C §240(c), "expert" means a physician and surgeon, and includes psychiatrists, psychologists, licensed clinical social workers, and licensed marriage and family therapists. See Evid C §§240(c), 1010(b), (c), (e).

In *People v Macioce* (1987) 197 CA3d 262, 242 CR 771, a woman who had allegedly experienced intimate partner battering was on trial for the murder of her husband. A friend to whom defendant had talked the day before the killing testified at the preliminary hearing but refused to testify at trial, and instead sat outside the courtroom crying. 197 CA3d at 281. Her family physician testified that he had treated the witness for stress after the preliminary examination, that she had been hospitalized after becoming suicidal, and that there was a 70 percent chance that testifying at trial would be detrimental to her. 197 CA3d at 281-282. The appellate court found that there was substantial evidence from which the trial court could reasonably have concluded that the witness was unable to testify without suffering substantial trauma and thus, was unavailable under Evid C §240(c). 197 CA3d at 283.

In *People v Winslow, supra,* 123 CA4th at 470-473, a victim of child molestation was properly found unavailable as a witness because of mental illness or infirmity due to crime-induced mental trauma under Evid C §240(c), when the child's treating psychiatrist testified that the child suffered from posttraumatic stress syndrome and stated his opinion that testifying at trial would be damaging to the child's emotional state. In addition, the physician testified that testifying would likely cause a return of the child's nightmares and would represent a setback in his recovery from his abduction and molestation. 123 CA4th at 470, 473.

§5.98 d. Refusal To Testify

In many domestic violence cases, the victim is physically present but refuses to testify. Evidence Code §240 does not explicitly include refusal to testify, on nonprivilege grounds, as a basis for unavailability. Nevertheless, the fact that a domestic violence victim is physically present in the courtroom and merely refuses to testify does not preclude a finding of unavailability. See *People v Smith* (2003) 30 C4th 581, 621, 623-624, 134 CR2d 1 (trial court properly admitted preliminary examination testimony of rape victim who refused to testify in penalty phase after being precluded from testifying to her opposition to death penalty). Although Evid C §240 does not specifically describe this situation, that statute does not state the exclusive circumstances under which a witness may be deemed legally unavailable for purposes of admitting former testimony under Evid C §1291. 30 C4th at 624; *People v Reed* (1996) 13 C4th 217, 228, 52 CR2d 106.

A trial court may admit former testimony of a witness who is physically available but who refuses to testify, without claiming a privilege, if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify, unless it is obvious that such steps would be unavailing. *People v Smith, supra,* 30 C4th at 624; *People v Francis* (1988) 200 CA3d 579, 584, 245 CR 923. Reasonable efforts may include questioning the witness under oath and asking whether additional time or prosecution for criminal contempt would change his or her mind. The court, however, need not fine a domestic victim-witness to establish that it has taken reasonable steps. Trial courts do not have to take extreme actions before making a finding of unavailability. *People v Smith, supra,* 30 C4th at 624.

In *People v Walker* (1983) 145 CA3d 886, 894-895, 193 CR 812, the court of appeal held that the trial court did not err in finding a witness unavailable and admitting his testimony at the preliminary hearing, when the witness refused to testify at trial despite the threat of a contempt citation, and confining the witness until he agreed to testify would have been unproductive in that he was already facing incarceration for 60 years. In *Walker*, defendant was charged with the first-degree murder of his wife. While in jail, he solicited a cellmate to kill a prospective prosecution witness. 145 CA3d at 889. Although defendant admitted he had beaten and murdered his wife, his defense was that he was an emotionally battered husband who saw no options other than suicide or homicide. 145 CA3d at 893. The cellmate whom defendant had solicited testified and was cross-examined at the preliminary hearing, but refused to testify at trial. 145 CA3d at 893.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/ XI. JURY INSTRUCTIONS IN DOMESTIC VIOLENCE CASES/§5.99 A. CALCRIM and CALJIC Instructions

XI. JURY INSTRUCTIONS IN DOMESTIC VIOLENCE CASES

§5.99 A. CALCRIM and CALJIC Instructions

Although domestic violence cases may be charged under many different Penal Code sections, the sections most specific to this type of relationship include Pen C §§136.1, 166, 243(e), 262, 273.5, 273.6, 422, and 646.9. The following chart and discussion focus on these sections.

Penal Code Section—Charge	CALCRIM Number	CALJIC Number
136.1: Intimidation of witness	2622-2623	7.14-7.15
166: Contempt/violation of protective order	2700-2703	none
243(e): Battery of former spouse, girlfriend/boyfriend, spouse, cohabitant, or co-parent	841	16.140.1
262: Spousal rape	1000-1005	10.00-10.05.1
273.5: Abuse of spouse, cohabitant, or co-parent	840	9.35-9.35.01
273.6: Violation of restraining order	2700-2703	none
422: Criminal threats	1300	9.94
646.9: Stalking	1301	9.16.1-9.16.22

B. Case Law Regarding Jury Instructions on Domestic Violence Crimes

§5.100 1. Intimidation of Witness: Pen C §136.1

To prove the offense of witness intimidation in violation of Pen C §136.1(c), the prosecution must establish that the defendant had the specific intent to dissuade a witness from testifying. *People v Young* (2005) 34 C4th 1149, 1211, 24 CR3d 112; *People v Ford* (1983) 145 CA3d 985, 989-990, 193 CR 684. Thus, a trial court errs in failing to instruct the jury that the offense of witness intimidation requires that defendant specifically intend to prevent or dissuade the victim. The error is harmless, however, when the evidence of defendant's specific intent to dissuade the victim from testifying at trial is overwhelming. *People v Young, supra,* 34 C4th at 1212; see CALCRIM 2623; CALJIC 7.15.

In *People v Ortiz* (2002) 101 CA4th 410, 124 CR2d 92, the defendant was charged with felony dissuasion of a witness under Pen C §136.1, but the trial court mistakenly instructed the jury only with the misdemeanor version of the crime. It failed to tell the jury that felony dissuasion additionally involves force or the threat of force. 101 CA4th at 416; see CALCRIM 2623; CALJIC 7.15. But see *People v McElroy* (2005) 126 CA4th 874, 880, 24 CR3d 439 (disagreeing with "broad language" in *Ortiz* suggesting that element of force differentiates misdemeanor and felony dissuasion so that failure to instruct on force element results in instruction only on misdemeanor). Nevertheless, the failure was harmless beyond a reasonable doubt, since no rational jury could have found the missing element unproven. *People v Ortiz, supra,* 101 CA4th at 416.

§5.101 2. Corporal Injury: Pen C §273.5

In a spousal battery case, the trial court did not err in refusing to add the term "unlawful" in addition to "willful" in CALJIC 9.35, the standard jury instruction on spousal battery, so that it mirrored the instruction given by the court on the offense of misdemeanor spousal battery using CALJIC 16.140.1. *People v Ayers* (2005) 125 CA4th 988, 996-997, 23 CR3d 242. In *Ayers*, the defendant argued that the word "unlawfully" requires the prosecution to prove beyond a reasonable doubt that the crime was not self-defense. 125 CA4th at 997. Defendant further contended that because the evidence was sufficient to raise a reasonable doubt whether he acted in self-defense, the trial court was required to instruct the jury that the burden was on the people to prove that his use of force was unlawful. Thus, by deleting the word "unlawfully," the court changed the prosecution's burden of proof. The court of appeal held that the trial court's refusal to modify CALJIC 9.35 did not mislead the jury into believing that defendant's self-defense instructions did not apply, nor did it confuse jurors regarding the prosecution's burden of proof. 125 CA4th at 997. In response to *Ayers*, CALJIC 9.35 was revised in 2005 to provide an instruction on self-defense or defense of others as a lawful use of force or violence in appropriate cases. CALCRIM 840 incorporates similar language.

In *People v Gutierrez* (1985) 171 CA3d 944, 951-953, 217 CR 616, in which the defendant-husband was convicted of a felony violation of Pen C §273.5 for beating his wife, the appellate court upheld the trial court's use of CALJIC 9.35 (1980 revision), which defines traumatic condition to include both serious and minor injuries, and delineates the elements of Pen C §273.5. The defendant argued that the level of injury he inflicted on his wife "knocking her down, banging her head on the floor, grabbing her by the neck and squeezing, leaving a red mark, knocking her down again and dragging her to the front porch by her hair, which pulled out a lot of hair and also lacerated her legs when he dragged her through broken glass" was not serious enough to constitute a "traumatic condition." 171 CA3d at 948.

§5.102 3. Criminal Threats: Pen C §422

A unanimity instruction is not required for a Pen C §422 criminal threats offense. *People v Jantz* (2006) 137 CA4th 1283, 1292, 40 CR3d 875; see CALJIC 17.01. That offense requires a threat of "death or great bodily injury" with the specific intent that the statement be taken as a threat. 137 CA4th at 1292; Pen C §422. In *Jantz*, the record showed that the prosecutor clearly informed the jury in opening and closing argument which threat the people had elected as the basis of the criminal threats offense. 137 CA4th at 1292. This election obviated the necessity of a unanimity instruction. *People v Russo* (2001) 25 C4th 1124, 1132, 108 CR2d 436; *People v Jantz, supra,* 137 CA4th at 1292. See also CALCRIM 3502.

§5.103 4. Stalking: Pen C §646.9

In *People v Carron* (1995) 37 CA4th 1230, 44 CR2d 328, a stalking case, the trial court, in answer to a jury question regarding the definition of "credible threat," repeated the instruction defining stalking that it had already given, and added that "it is not required that the person making the threat actually intended to carry out the threat." 37 CA4th at 1234-1236. The appellate court upheld the instruction, finding that Pen C §646.9 does not require intent to kill or cause great bodily injury. 37 CA4th at 1236-1240, citing *People v Heilman* (1994) 25 CA4th 391, 399, 30 CR2d 422; in accord, *People v Falck* (1997) 52 CA4th 287, 297-298, 60 CR2d 624. This definition of intent was codified in the 1995 amendment to Pen C §646.9, and has been incorporated in CALJIC 9.16.1. See also CALCRIM 1301.

§5.104 C. Limiting Instructions on Testimony of Intimate Partner Battering

When the prosecution presents expert testimony regarding the effects of intimate partner battering, it is appropriate for the court, on request, to give a limiting instruction regarding the purposes for which such testimony may be considered, as a result of the statutory prohibition in Evid C §1107(a) on using such evidence to prove the occurrence of the act or acts of abuse forming the basis of the criminal charge. *People v Humphrey* (1996) 13 C4th 1073, 1088 n5, 56 CR2d 142. The fact that CALJIC 9.35.1 advises the jury that intimate partner research "begins with the assumption that physical abuse has occurred, and seeks to describe and explain the common reactions of women to that experience" does not implicitly assume that the defendant is guilty. The instruction expressly says that the jury must "presume the defendant innocent." See *People v Brown* (2004) 33 C4th 892, 902, 16 CR3d 447 (construing prior but similar version of CALJIC 9.35.1 using "battered woman" terminology).

No published decision specifically requires the giving sua sponte of an instruction on the use of expert testimony regarding the effects of intimate partner battering. However, courts should consider giving the limiting instruction sua sponte in intimate partner abuse cases. See *People v Housley* (1992) 6 CA4th 947, 957-959, 8 CR2d 431 (sua sponte instruction is required when court admits expert testimony regarding effects of child sexual abuse accommodation syndrome); *People v Brown* (2004) 33 C4th 892, 905, 16 CR3d 447 (noting close analogy between use of expert testimony to explain behavior of victims of intimate partner violence, and use of such testimony concerning victims of child abuse). See also CALCRIM 850-851 and CALJIC 9.35.1 (instructions on use of testimony of intimate partner battering).

In *People v Jaspar* (2002) 98 CA4th 99, 119 CR2d 470, the trial court gave a modified version of CALJIC 9.35.1 that the jury should consider "whether the defendant actually *and reasonably* believed in the necessity to use force to defend herself against imminent peril to life or great bodily injury." 98 CA4th at 109 (emphasis added). The defendant argued that this modification limited the application of evidence on the effects of intimate partner battering to perfect self-defense, thus precluding the jury from considering such evidence on the question of imperfect self-defense. 98 CA4th at 109. The court of appeal acknowledged that although this portion of CALJIC 9.35.1 was potentially confusing when read in isolation, when read in conjunction with the entire instruction and with the other instructions, and when combined with the arguments of counsel, the potential for confusion was dissipated. See 98 CA4th at 111 n6 (CALJIC 9.35.1 has since been revised based on suggestion made in *Jaspar*).

§5.105 D. Instructions Regarding Evidence of Uncharged Domestic Violence

CALJIC 2.50.02 (see also CALCRIM 852), which instructs the jury on the inference of criminal propensity that may be drawn from a defendant's commission of uncharged domestic violence offenses under Evid C §1109, does not create an unreasonable inference in violation of the defendant's right to due process that a prior incident of domestic violence may support an inference that a defendant had a disposition to commit another offense involving domestic violence. *People v Rucker* (2005) 126 CA4th 1107, 25 CR3d 62; *People v Pescador* (2004) 119 CA4th 252, 259-260, 14 CR3d 165.

Nor does CALJIC 2.50.02 unconstitutionally undermine the presumption of innocence or the requirement of proof beyond a reasonable doubt by allowing the jury to infer that defendant committed the charged offense based solely on prior acts of domestic violence. 119 CA4th at 261-262. Like CALJIC 2.50.01 (see also CALCRIM 1191), which addresses admission of evidence of a defendant's prior uncharged sexual offenses, CALJIC 2.50.02 contains an admonition that defendant's commission of prior crimes is not sufficient by itself to prove beyond a reasonable doubt that he or she committed the charged offense. See 119 CA4th at 261. For purposes of evaluating the constitutional validity of the instructions, there is no material difference between CALJIC 2.50.01 and CALJIC 2.50.02. 119 CA4th at 261; *People v Escobar* (2000) 82 CA4th 1085, 1097 n7, 98 CR2d 696. Thus, by telling jurors that evidence of prior offenses is insufficient to prove defendant's guilt of the charged offenses beyond a reasonable doubt, jurors necessarily understand that they must consider all the other evidence before convicting defendant. *People v Pescador, supra,* 119 CA4th at 261, citing *People v Reliford* (2003) 29 C4th 1007, 1015, 130 CR2d 254 (upholding CALJIC 2.50.01 against similar attack).

A trial court errs in modifying CALJIC 2.50.02 to permit the jury to draw a propensity inference from other domestic violence offenses charged in the same case. *People v Quintanilla* (2005) 132 CA4th 572, 579-583, 33 CR3d 782, judgment vacated by *Quintanilla v California* (2007) 549 US 1191, 127 S Ct 1215, 167 L Ed 2d 40 (error found to be harmless). The intent of Evid C §1109 is to make evidence of uncharged domestic violence admissible in cases where it was not previously permitted. 132 CA4th at 579; *People v Brown* (2000) 77 CA4th 1324, 1332-1334, 92 CR2d 433. Nevertheless, the Legislature was careful to provide that evidence of other domestic violence offenses may be excluded when it is unduly prejudicial. Evidence of other offenses charged in the same case cannot be excluded, however, no matter how prejudicial they may be. *People v Quintanilla, supra,* 132 CA4th at 579-580. Without that safeguard, it is fundamentally unfair to allow the jury to infer the defendant's propensity to commit crimes of domestic violence from his commission of other charged offenses. 132 CA4th at 580. But see *People v Wilson* (2008) 166 CA4th 1034, 1052-1053, 83 CR3d 326 (court may modify CALCRIM 1191 to permit jury to draw propensity inference from other charged sex offenses; Evid C §1108 does not limit its application to cases involving uncharged sex offenses). For discussion of Evid C §1109, see §§5.60-5.61.

The trial court may, in an appropriate case, instruct sua sponte on the limited admissibility of evidence of past criminal conduct. However, it is under no duty to do so. *People v Collie* (1981) 30 C3d 43, 63, 177 CR 458. In *Collie*, an attempted murder and forcible sodomy case in which defendant tried to murder his wife, evidence of previous assaults allegedly committed by defendant on the victim were introduced at trial. 30 C3d at 63. On appeal, defendant argued that the court failed to instruct the jury regarding the limited admissibility of evidence of past criminal conduct. In upholding the trial court, the court of appeal stated (30 C3d at 64):

> There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence. But … in this case, and in general, the trial court is under no duty to instruct sua sponte on the limited admissibility of evidence of past criminal conduct.

§5.106 E. Instructions Regarding Seriousness of Injury, Lesser Included Offenses, and Relevant Defenses

Jury instructions formed part of the basis for an appeal in *People v Lee* (1999) 20 C4th 47, 82 CR2d 625, a murder prosecution, in which the defendant was convicted of the voluntary manslaughter of his wife. The court of appeal reversed the conviction for instructional error. 20 C4th at 51. The Supreme Court reversed, finding that although the jury might have convicted the defendant of involuntary manslaughter if the trial judge had given an instruction on misdemeanor manslaughter, the error could not have prejudiced defendant because the involuntary manslaughter instructions that were given permitted conviction of that offense if the jury found only an unlawful, unintentional killing without malice. 20 C4th at 52, 62-65. Because the jury rejected a finding of involuntary manslaughter, and because the evidence was sufficient to convict the defendant of a greater crime than that for which he was convicted, any error was favorable to the defendant. 20 C4th at 64-65.

In *People v Gutierrez* (1985) 171 CA3d 944, 217 CR 616, in which the defendant-husband was convicted of a felony violation of Pen C §273.5 for beating his wife, the court discussed which lesser offenses are included in Pen C §273.5. Noting that "[i]t is injury resulting in a traumatic condition that differentiates this crime from lesser offenses," the court found that both simple assault and misdemeanor battery are included in a prosecution of Pen C §273.5. 171 CA3d at 952. Because the jury was so instructed, the defendant was protected from a felony conviction for inflicting de minimis harm. The nature of harm depicted by the evidence clearly justified the felony verdict. 171 CA3d at 952.

In many cases, sua sponte instructions regarding relevant defenses and lesser included offenses are required, because those matters are closely and openly connected with the evidence and with the fate of the defendant in those cases. *People v Collie* (1981) 30 C3d 43, 63, 177 CR 458. Even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence that the defendant is guilty only of the lesser offense. *People v Birks* (1998) 19 C4th 108, 118, 77 CR2d 848.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/5 Considerations at Preliminary Hearing or Trial/§5.107 F. Instructions Regarding Cohabitation

§5.107 F. Instructions Regarding Cohabitation

In *People v Holifield* (1988) 205 CA3d 993, 1001-1002, 252 CR 729, a prosecution for corporal injury on a cohabitant, the trial court properly instructed the jury that "cohabiting" means unrelated persons living together for a substantial period of time, resulting in some permanency of relationship. This definition has been incorporated into CALCRIM 840 and CALJIC 9.35, defining corporal injury, and into CALCRIM 852 and CALJIC 2.50.02, which instruct on the use of evidence of other acts of domestic violence under Evid C §1109. See also *People v Moore* (1996) 44 CA4th 1323, 1334, 1335, 52 CR2d 256 (permanence does not require exclusivity; defendant may cohabit with more than one person simultaneously during same time period).

In *People v Ballard* (1988) 203 CA3d 311, 319, 249 CR 806, the court properly refused to instruct the jury that cohabitation required a finding of sexual relationship in order to convict under Pen C §273.5. See §1.5 for discussion.

6

Sentencing Domestic Violence Offenders

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/ I. SENTENCING OVERVIEW/§6.1 A. Sentencing Objectives in Domestic Violence Cases

I. SENTENCING OVERVIEW

§6.1 A. Sentencing Objectives in Domestic Violence Cases

The general objectives of sentencing in a domestic violence case are to:

- Stop the violence;
- Protect the victim, the children, and other family members;
- Protect the general public (see Cal Rules of Ct 4.410(a)(1));
- Hold the batterer accountable for the violent conduct (see Cal Rules of Ct 4.410(a)(2));
- Provide restitution to the victim (see Cal Rules of Ct 4.410(a)(6); §6.5);
- Rehabilitate the batterer (see Cal Rules of Ct 4.410(a)(3)); and
- Uphold the legislative intent to treat domestic violence as a serious crime.

California Rules of Ct 4.410 contains a complete list of sentencing objectives applicable to all criminal cases.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.2 B. Checklist: Sentencing Considerations in Domestic Violence Cases

§6.2 B. Checklist: Sentencing Considerations in Domestic Violence Cases

1. Enhanced sentences for domestic violence offenders have been upheld in the following situations:

(a) Factors relating to crime.

- *Viciousness and callousness*. Cal Rules of Ct 4.421(a)(1); *People v Nevill* (1985) 167 CA3d 198, 205-206, 212 CR 898 (defendant repeatedly fired semi-automatic rifle at his helpless wife at point-blank range in front of their 16-month-old child).
- *Use of weapon.* Cal Rules of Ct 4.421(a)(2); *People v Betterton* (1979) 93 CA3d 406, 415, 155 CR 537; see *People v Burton* (2006) 143 CA4th 447, 457-458, 49 CR3d 334 (use of gloves with sharp edges qualifies as dangerous weapon under Pen C §12022(b)(1) for purpose of enhancing corporal injury and torture convictions).
- *Victim particularly vulnerable*. Cal Rules of Ct 4.421(a)(3); *People v Hoover* (2000) 77 CA4th 1020, 1031, 92 CR2d 208 (aggravated assault victim was particularly vulnerable because she was in state of "acute alcohol intoxication" and because incident occurred in motel room); *People v Nevill, supra,* 167 CA3d at 204-205 (defendant exploited wife's fear for welfare of her child in luring her away from work, then fired "fusillade" of bullets into unsuspecting, unarmed, physically and mentally abused woman in bedroom of her home as she sat on edge of her bed, and continued to blast away as she lay helpless after initial shots).
- *Planning or sophistication indicating premeditation*. Cal Rules of Ct 4.421(a)(8); *People v Kozel* (1982) 133 CA3d 507, 517, 539-540, 184 CR 208 (husband drove with pistol to estranged wife's home, then her boyfriend's home, reflecting planning).
- *Defendant took advantage of position of trust or confidence to commit offense*. Cal Rules of Ct 4.421(a)(11); *People v Hoover, supra,* 77 CA4th at 1031 (defendant exploited his intimate relationship with victim to induce her to come to motel room where she would be vulnerable to attack).

(b) Factors relating to defendant.

- *Engaging in violent conduct*. Cal Rules of Ct 4.421(b)(1); see *People v Betterton, supra,* 93 CA3d at 415-416 (violent conduct indicating serious danger to society).
- *Prior convictions*. Cal Rules of Ct 4.421(b)(2); *People v Arviso* (1988) 201 CA3d 1055, 1059, 247 CR 559 (prior convictions were "numerous and of increasing seriousness").

(c) Other factors

- *Enhancement for great bodily injury under circumstances involving domestic violence.* Pen C §12022.7(e). Defendant, who physically abused wife, then committed assault with deadly weapon by stabbing man with whom wife was having affair as part of same incident, could have sentence enhanced under Pen C §12022.7(e). *People v Truong* (2001) 90 CA4th 887, 899-900, 108 CR2d 904. Enhancement for great bodily injury under Pen C §12022.7(e) for circumstances involving domestic violence requires only general intent. *People v Carter* (1998) 60 CA4th 752, 756, 70 CR2d 569. See *People v Hale* (1999) 75 CA4th 94, 108, 88 CR2d 904 (facial and dental injuries and abrasions support great bodily injury requirement in torture conviction (Pen C §206)).
- *On-bail enhancement*. *People v Smith* (2006) 142 CA4th 923, 933-935, 48 CR3d 378 (defendant arrested for spousal battery and released on bail is subject to on-bail enhancements for crimes committed while on bail for felony for subsequent offenses committed against wife, although it had not been determined whether spousal battery was felony or misdemeanor when defendant was released on bail).
- *Commission of serious felony after prior conviction for serious felony*. Pen C §667(a). *People v Ringo* (2005) 134 CA4th 870, 882-884, 36 CR3d 444 (prior conviction for making criminal threat under Pen C §422 is serious felony warranting five-year enhancement under Pen C §667(a)); *People v Neely* (2004) 124 CA4th 1258, 22 CR3d 274 (dissuasion of witness under Pen C §136.1 is serious felony under Pen C §1192.7(c)(37) that may be used as enhancement under Pen C §667(a)).

2. Other considerations applicable in domestic violence sentencing include:

- *Marital problems not mitigating circumstances.* Defendant's marital problems are not mitigating circumstances in domestic violence cases. See *People v Whitehouse* (1980) 112 CA3d 479, 485, 169 CR 199 (defendant set fire to car belonging to his wife or her boyfriend).
- *Prior treatment for domestic violence*. The significance of the fact of prior treatment is left to the discretion of the sentencing court. See Cal Rules of Ct 4.408(a). See *People v Laino* (2004) 32 C4th 878, 895-898, 11 CR3d 723 (defendant's previous guilty plea in another state to aggravated assault with handgun against his wife counted as strike under Pen C §667, even though he successfully completed domestic violence "diversion" program in other state; lack of similar diversion program in California a factor).
- *Substance abuse*. See Cal Rules of Ct 4.408(a).
- *Dangerous animosity*. See *People v Kozel, supra,* 133 CA3d at 540.
- *Infliction of physical harm or threat of such harm on other parent or child during child abduction.* Pen C §278.6(a)(2).
- *Commission of violent act by relative or household member in presence of a minor.* Pen C §1170.76. It is a circumstance in aggravation if the defendant commits a sexual battery, assault with a deadly weapon, or corporal injury on a spouse, cohabitant, or co-parent, and the act occurred in the presence of, or was witnessed by, a child in the household. Pen C §1170.76.
- *Commission of felony assault or battery to dissuade witness from testifying*. Pen C §1170.85(a). It is a circumstance in aggravation that the defendant committed a felony assault or battery against a potential witness for the purpose of dissuading that person from testifying or in retaliation for that person providing information to law enforcement officers or prosecutors. Pen C §1170.85(a).
- *Victim vulnerable or unable to defend himself or herself.* Pen C §1170.85(b). On conviction of any felony, fact that victim was particularly vulnerable or unable to defend himself or herself due to age or significant disability is circumstance in aggravation. Pen C §1170.85(b).
- *Great bodily injury*. Pen C §12022.7. Penal Code §12022.7 provides three-year enhancement for any person who personally inflicts great bodily injury on a person other than an accomplice (Pen C §12022.7(a)), and five-year enhancements for brain injury inducing coma or paralysis (Pen C §12022.7(b)), and for great bodily injury to a person 70 years of age or older (Pen C §12022.7(c)).
- *Imposing sentence greater than statutory maximum*. Any fact that exposes a defendant to a greater potential sentence than the statutory maximum must be found by a jury rather than a judge, and must be established beyond a reasonable doubt, not by a preponderance of the evidence. *Cunningham v California* (2007) 549 US 270, 281-282, 127 S Ct 856, 166 L Ed 2d 856; see also Pen C §1170; Cal Rules of Ct 4.420. For discussion of *Cunningham* and the subsequent urgency legislation amending Pen C §1170, see §6.3.
- *Double jeopardy considerations*. Double jeopardy applies to all enhancements except "typical sentencing determination" like prior conviction allegations, although the same protections generally do not extend to noncapital sentencing proceedings involving prior conviction allegations. In addition, elements of a sentence enhancement other than one for a prior conviction must be proved beyond a reasonable doubt if there is exposure to increased punishment. *Apprendi v New Jersey* (2000) 530 US 466, 490, 120 S Ct 2348, 147 L Ed 2d 435; *People v Seel* (2004) 34 C4th 535, 542, 549-550 n6, 21 CR3d 179.
- *Multiple punishment considerations*. See Pen C §654. Penal Code §654 prohibits multiple punishment for the same crime when the crimes constitute "a course of conduct comprising an indivisible transaction." *People v Bauer* (1969) 1 C3d 368, 376, 82 CR 357. However, Pen C §654 does not apply when one act has two results, each of which is an act of violence against the person of a separate individual. *Neal v State* (1960) 55 C2d 11, 20-21, 9 CR 607; *People v Pantoja* (2004) 122 CA4th 1, 15-16, 18 CR3d 492 (Pen C §654 does not prevent defendant from being punished separately for child endangerment in addition to first-degree murder after killing his girlfriend in presence of their daughter). For discussion of multiple punishment, see §3.28.

§6.3 C. *Cunningham v California* and Its Impact

In 2007, the United States Supreme Court declared California's Determinate Sentencing Law (DSL), Pen C §§1170 et seq, unconstitutional under the Sixth Amendment right to a jury trial to the extent that it permits trial courts to impose an upper sentencing term based on facts found by the court by a preponderance of evidence, rather than by a jury beyond a reasonable doubt. *Cunningham v California* (2007) 549 US 270, 293, 127 S Ct 856, 166 L Ed 2d 856; see *People v Calhoun* (2007) 40 C4th 398, 406, 53 CR3d 539. Under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence than the statutory maximum must be found by a jury rather than a judge, and must be established beyond a reasonable doubt, not merely by a preponderance of the evidence. *Cunningham v California, supra,* 549 US at 281-282; *Apprendi v New Jersey* (2000) 530 US 466, 490, 120 S Ct 2348, 147 L Ed 2d 435. The relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts; it is the maximum the judge may impose without any additional findings. *Cunningham v California, supra,* 127 S Ct at 865 (emphasis omitted); *Blakely v Washington* (2004) 542 US 296, 303, 124 S Ct 2531, 159 L Ed 2d 403. In California, most statutes defining criminal offenses prescribe three terms of imprisonment, a lower-, a middle-, and an upper-term sentence. *Cunningham v California, supra,* 549 US at 283; see Pen C §1170(b); and see, *e.g.*, Pen C §646.9(b) (person convicted of stalking when temporary restraining order, injunction, or other court order is in effect must be punished by prison term of two, three, or four years). Under the DSL, the court must impose the middle term unless there are circumstances in aggravation or mitigation of the crime. Pen C §1170(b). Circumstances in aggravation or mitigation must be established by a preponderance of the evidence and are determined by the court after considering the factors listed in Pen C §1170(b). See Cal Rules of Ct 4.420(a), (b); Pen C §1170.3(a)(2).

Thus, under California's DSL, an upper-term sentence may be imposed only when the trial judge finds an aggravating circumstance. 127 S Ct at 868; see Pen C §1170(b). Accordingly, the middle term prescribed in California's DSL, not the upper term, is the relevant statutory maximum. 127 S Ct at 868; *Blakely v Washington, supra,* 542 US at 303. Because the DSL allocates sole authority to judges to find facts that permit the imposing of an upper-term sentence, the system violates the Sixth Amendment. *Cunningham v California, supra,* 549 US at 293.

In response to *Cunningham*, urgency legislation was signed into law, effective March 30, 2007, amending Pen C §1170 to provide that when a felony is punishable by a triad of terms of incarceration in state prison, the choice of the appropriate sentencing term rests within the sound discretion of the trial judge. See 2007 ch 3 (SB 40); Cal Rules of Ct 4.401-4.452 (rules amended, effective May 23, 2007, to comply with *Cunningham* and SB 40).

II. VICTIM CONSIDERATIONS

§6.4 A. Victim Impact Statements

A crime victim in California has the right to attend all sentencing proceedings. Pen C §1191.1; see Cal Const art I, §28(b)(7). In addition, victims have the right to appear personally or by counsel at sentencing proceedings and to express their views concerning the crime, the person responsible, and the need for restitution See Pen C §1191.1. The right to attend and to make a statement at the sentencing hearing extends to the victim's parents or guardians if the victim is a minor, and to the victim's next of kin if the victim has died. Pen C §1191.1. The trial court has discretionary power under Pen C §1191.1 to hear witnesses who are not strictly victims, if appropriate. *People v Zikorus* (1983) 150 CA3d 324, 332, 197 CR 509; see *People v Brown* (2003) 31 C4th 518, 573 n24, 3 CR3d 145 (victim-impact evidence in capital trial is not limited to blood relatives; jury could consider statement of victim's mother-in-law).

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), adding Cal Const art I, §28(e), which broadens the definition of the victim to include the victim's spouse, parents, children, siblings, or guardian, and a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. Proposition 9 also added Cal Const art I, §28(d), providing that a court in its discretion may extend the right to be heard at sentencing to any person "harmed" by the defendant. No definition of "harmed" is provided, but is likely broader than "victim." These constitutional provisions appear to allow the trial court to depart from Pen C §1191.1, which restricts comments to victims or immediate family members.

In lieu of or in addition to personally appearing at the sentencing procedure, the victim, his or her parent or guardian if the victim is a minor, or the victim's next of kin if the victim has died, may file with the court a statement expressing views concerning the crime, the person responsible, and the need for restitution. Pen C §1191.15(a). The statement may be in writing; or may be audiotaped; videotaped; or stored on CD, DVD, or on any other recording medium acceptable to the court. See Pen C §1191.15(a); see also §4.2 regarding the right of the victim to be informed of a pretrial disposition, and Pen C §1191.25, regarding the victim's right to be informed of a possible reduction in sentence when a crime was committed by an in-custody informant who is about to give testimony. The court is required to consider these impact statements before imposing judgment and sentence. Pen C §§1191.1, 1191.15(a).

In addition, if the defendant is subject to an indeterminate term of imprisonment, the victim, his or her parents or guardians if the victim is a minor, or the next of kin if the victim has died, may have their statements simultaneously recorded and preserved by videotape, videodisc, or any other means of preserving audio and video, if they notify the prosecutor before the sentencing hearing, and the prosecutor is reasonably able to provide the means to record and preserve the statement. Pen C §1191.16. The prosecution must maintain and preserve such video or audio records and must use them at any hearing to review parole suitability or the setting of a parole date. See Pen C §1191.16.

The California victim impact statutes do not address the procedure by which victims may be heard. Because victim impact statements are made at sentencing rather than at trial, the right to confrontation is not implicated. *People v Birmingham* (1990) 217 CA3d 180, 184, 265 CR 780; *People v Huber* (1986) 181 CA3d 601, 635-636, 227 CR 113. Nor is hearsay a ground for objection. *People v Birmingham, supra,* 217 CA3d at 184. Some judges allow statements without an oath unless the facts of the case or details of the crime are raised. See 217 CA3d at 183-185 (trial judge correctly permitted mothers of two sexual abuse victims to make unsworn statements at sentencing hearing under Pen C §1191.1, and in not permitting cross-examination of the two mothers). The court's consideration of unsworn victim statements at sentencing does not impair the defendant's right to a fundamentally fair hearing. 217 CA3d at 185.

In *People v Huber, supra,* 181 CA3d at 635-636, the court denied defense counsel's request to be allowed to cross-examine victims who had given impact statements under Pen C §1191.1. However, the judge informed defense counsel that the judge was willing to make inquiries for defense counsel. This procedure was upheld against Sixth Amendment challenge. 181 CA3d at 636.

Oath-taking and cross-examination of the victim regarding the impact statement may give victims the feeling that they are on trial and thus, in effect, nullify the intent of the legislation. To avoid this undesirable result, the judge might

frame the victim's statement by inviting remarks on the impact of the crime on the victim's life, and the victim's perspective on the need for restitution.

For crimes in which there are three possible terms under the Penal Code, at least four days before the time set for imposing judgment, the victim, or the family of the victim if the victim is dead, may submit a statement in aggravation or mitigation. Pen C §1170(b).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.5 B. Restitution

§6.5 B. Restitution

In every case in which a crime victim suffers a loss, the court must order the defendant convicted of the crime to make restitution to the victim. See Cal Const art I, §28(b)(13); Pen C §1202.4(a); see also Pen C §1191.2 (probation officer must provide victim with information concerning victim's right to civil recovery against defendant). Thus, the California Constitution guarantees that crime victims will receive restitution. *People v O'Neal* (2004) 122 CA4th 817, 820, 19 CR3d 202; see Cal Const art I, §28(b)(13); for definition of "victim," see Cal Const art I, §28(e) and Pen C §1202.4(k).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.6 1. Losses Subject to Restitution; Amount

§6.6 1. Losses Subject to Restitution; Amount

Restitution under Pen C §1202.4 must be a dollar amount sufficient to fully reimburse the victim for every determined economic loss incurred as the result of defendant's criminal conduct. Pen C §1202.4(f)(3). Penal Code §1202.4(f)(3) lists a number of losses and expenditures that qualify as recoverable economic losses. The list is not inclusive. Because Pen C §1202.4(f)(3) uses the language "including, but not limited to" in connection with the enumerated list, a trial court may compensate a victim for any economic loss proven to be the direct result of the defendant's criminal behavior, even if the loss is a type not specifically enumerated in the statute. *People v Keichler* (2005) 129 CA4th 1039, 1046, 1047, 29 CR3d 120 (ordering restitution to Hmong victims of hate crime for cost of traditional healing ceremony found to be "equivalent of western medical expenses"). Those items include the following (Pen C §1202.4(f)(3)(A)-(K)):

- Payment for the value of stolen or damaged property.
- Medical expenses.
- Mental health counseling expenses.
- Wages or profits lost due to injury incurred by the victim; if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor.
- Wages or profits lost by the victim; if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution.
- Noneconomic losses, including but not limited to psychological harm, for felony violations of Pen C §288.
- Interest, at the rate of 10 percent per year, accruing as of the date of sentencing or loss, as determined by the court.
- Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim.
- Expenses incurred by an adult victim in relocating away from the defendant, as verified by law enforcement to be necessary for the personal safety of the victim, or by a mental health treatment provider to be necessary for the emotional well-being of the victim.
- In cases involving violent felonies as defined by Pen C §667.5(c), expenses to install or increase residential security, including adding a home security device or system, or replacing or increasing the number of locks.
- If the victim is permanently disabled as a direct result of the crime, expenses for retrofitting a residence, a vehicle, or both, to make the residence accessible to or the vehicle operational by the victim.

A victim seeking restitution, or someone on his or her behalf, initiates the restitution process by identifying the losses the victim has sustained and showing that the losses were caused by the crime committed by the defendant. *People v Fulton* (2003) 109 CA4th 876, 885-886, 135 CR2d 466. The amount of restitution must be proved by a preponderance of the evidence. *People v Gemelli* (2008) 161 CA4th 1539, 1542-1543, 74 CR3d 901. Once the victim makes a prima facie showing of economic losses, the burden shifts to the defendant to disprove the amount of the claimed losses. 161 CA4th at 1543. The defendant has the burden of showing that the restitution recommendation in the probation report or the victims' estimates are inaccurate. *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1.

Any assistance to a victim provided by the Restitution Fund as a result of defendant's conduct must be included in the amount of restitution ordered by the court. Pen C §1202.4(f)(4)(A). There is a presumption that Restitution Fund assistance is a direct result of the defendant's conduct. See Pen C §1202.4(f)(4)(A). Copies of bills submitted to the California Victim Compensation and Government Claims Board for medical, dental, funeral, counseling, wage loss, and rehabilitation expenses must be submitted to establish the amount of assistance provided by the Restitution Fund. Pen C §1202.4(f)(4)(B). If the defendant wishes to rebut the presumption that payments under the Fund are a direct result of his or her conduct, the court may release additional information contained in the Board's records to the defendant, but only after reviewing the records in camera and determining that the information is necessary for the defendant to challenge the restitution order. Pen C §1202.4(f)(4)(C).

§6.7 2. Amount Initially Uncertain

If the amount of loss cannot be ascertained at the time of sentencing, the restitution order must include a provision that the amount will be determined at the direction of the court. Pen C §1202.4(f). See *People v Amin* (2000) 85 CA4th 58, 62, 101 CR2d 756 (as part of plea bargain, defendant agreed to pay restitution, and decision on amount was reserved by court for later hearing). The court retains jurisdiction over a defendant subject to a restitution order for purposes of imposing or modifying restitution until the losses can be determined. Pen C §1202.46. There is no limitation on when the court must set the restitution hearing. See *People v Bufford* (2007) 146 CA4th 966, 53 CR3d 273 (trial court did not lose jurisdiction to order restitution, notwithstanding that defendant had fully served her sentence before the final restitution hearing was held). Furthermore, nothing in Pen C §1202.46 prohibits a victim, the district attorney, or a court on its own motion from requesting correction of a sentence at any time if the sentence is invalid due to omission of a restitution order or fine. Pen C §1202.46; *People v Moreno* (2003) 108 CA4th 1, 10, 132 CR2d 918.

§6.8 3. No Waiver of Full Restitution

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which amended Cal Const art I, §28(b), removing language allowing the waiver of a portion of or all victim restitution if there are compelling and extraordinary reasons for not ordering full restitution. Proposition 9 effectively negates provisions in Pen C §§1203.3(b)(4), 1202.4(f), (g), and (n), authorizing the reduction of restitution for compelling and extraordinary reasons.

§6.9 4. Relation of Restitution Order to Probation

When the court places a defendant on probation, the court must make payment of restitution, restitution fines, and other orders imposed under Pen C §1202.4 a condition of probation. See Pen C §1202.4(m). Any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation continues to be enforceable by a victim under Pen C §1214 until the obligation is satisfied. Pen C §1202.4(m). For discussion of restitution fines, see §6.12.

In addition, if the court grants probation to a defendant in a domestic violence case, it may order the defendant to pay reasonable expenses incurred by the victim as a direct result of the defendant's offense. See Pen C §1203.097(a)(11)(B); see §6.27.

§6.10 5. Defendant's Financial Disclosure Statement

In any case in which a restitution order may be entered, the defendant must prepare and file a disclosure identifying all assets, income, and liabilities in which the defendant held or controlled a present or future interest as of the date of defendant's arrest in the case. Pen C §1202.4(f)(5). The disclosure statement must be made on Judicial Council form CR-115, and must be signed by the defendant. See Pen C §1202.4(f)(5); see also Judicial Council form CR-117 (instructions for CR-115). A defendant may file a financial affidavit or financial information under Pen C §987(c) in place of the disclosure required by Pen C §1202.4(f)(4). Pen C §1202.4(f)(6).

The defendant's disclosure statement must be filed no later than the date set for the defendant's sentencing, unless the court directs otherwise. Pen C §1202.4(f)(7). The court has discretion to relieve the defendant of this filing requirement by requiring the defendant to submit the disclosure as an attachment to a probation or other specified report or stipulation. Pen C §1202.4(f)(8). The defendant's disclosure statement must be made available to the victim. Pen C §1202.4(f)(5). A defendant who willfully states as true any material matter on the disclosure that the defendant knows to be false is guilty of a misdemeanor, unless this conduct is punishable as perjury, or another provision of law provides for a greater penalty. Pen C §1202.4(f)(5).

The court may consider a defendant's unreasonable failure to make a complete disclosure as any of the following (Pen C §1202.4(f)(9)):

- A circumstance in aggravation of the crime in imposing sentence under Pen C §1170(b);
- A factor indicating that the interests of justice would not be served by admitting the defendant to probation under Pen C §1203;
- A factor indicating that the interests of justice would not be served by conditionally sentencing the defendant under Pen C §1203; or
- A factor indicating that the interests of justice would not be served by imposing less than the maximum fine and sentence fixed by law for the case.

A defendant's failure or refusal to make the required disclosure may not delay entry of an order of restitution or pronouncement of sentence. Pen C §1202.4(f)(10). In appropriate cases, the court may: (1) require the defendant to be examined by the district attorney; (2) if sentencing the defendant under Pen C §1170, provide that the victim receive a copy of the portion of the probation report concerning the defendant's employment, occupation, finances, and liabilities; or (3) if sentencing the defendant under Pen C §1203, set a date and place for submission of the disclosure as a condition of probation or suspended sentence. Pen C §1202.4(f)(10).

§6.11 6. Income Deduction Orders

On entry of a restitution order under Pen C §1202.4(a)(3), the court also must enter a separate order for income deduction on determining the defendant's ability to pay in accordance with Pen C §1203, regardless of the defendant's probation status. Pen C §1202.42(a). The court may consider future earning capacity when determining the defendant's ability to pay. The defendant bears the burden of demonstrating lack of ability to pay. Pen C §1202.42(a). The order for income deduction is stayed until the agency in the county responsible for collection of restitution determines that the defendant has failed to meet his or her obligations under the restitution order and has not provided the agency with good cause for the failure. Pen C §1202.42(b)(1).

§6.12 C. Restitution Fines

In addition to paying restitution to the victim under Pen C §1202.4(f), Pen C §1202.4(b) requires the court to order defendant to pay a fine in the form of a penalty assessment under Pen C §1464 and to pay a restitution fine, unless the court finds compelling and extraordinary reasons for not ordering the restitution fine and states those reasons on the record. See Pen C §1202.4(a)(3), (b), (c). The court has discretion to set the amount of the restitution fine. However, if the defendant is convicted of a felony, the restitution fine must not be less than $200, nor more than $10,000. If defendant is convicted of a misdemeanor, the restitution fine cannot be less than $100 nor more than $1000. Pen C §1202.4(b)(1). The court must not consider a defendant's inability to pay as a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the statutory minimum. Pen C §1202.4(c)-(d).

In every case in which a defendant is convicted of a crime and the court imposes a conditional sentence or a sentence including a period of probation, the court must assess an additional probation revocation restitution fine in the same amount as the restitution fine imposed under Pen C §1202.4(b). See Pen C §§1202.44, 1202.4(m). The additional probation revocation restitution fine becomes effective on revocation of the defendant's probation or conditional sentence. The court cannot waive or reduce a probation revocation restitution fine absent compelling and extraordinary reasons stated on the record. Pen C §1202.44.

Similarly, in every case in which a defendant is convicted of a crime and the sentence includes a period of parole, the court, in addition to imposing a restitution fine under Pen C §1202.4(b), must assess a parole revocation restitution fine in the same amount assessed as the restitution fine. Pen C §1202.45. The parole revocation assessment fine is suspended unless and until the court revokes defendant's parole. Pen C §1202.45.

§6.13 D. Victim Safety: Protective Orders, Notification of Release

Under the California Constitution, innocent victims have a right to expect that those who commit felonies that cause injury to them "will be appropriately and thoroughly investigated, appropriately detained in custody …, tried by the courts, … and sufficiently punished so that public safety is protected and encouraged as a goal of the highest importance." See Cal Const art I, §28(a)(4). Similarly, the California Supreme Court has mandated that courts carefully consider the degree of danger to society that defendant poses. *In re Rodriguez* (1975) 14 C3d 639, 654, 122 CR 552.

Incarceration is an effective way to prevent the defendant from reharming the victim, at least for the term of custody. If the court grants probation, with or without incarceration, Pen C §1203.097(a)(2) requires that the court issue a criminal protective order in every domestic violence case as a term of probation. The purpose of this order is to protect the victim from further acts of violence, threats, stalking, sexual abuse, and harassment. If appropriate, such orders should contain residence exclusion or stay-away conditions. Pen C §1203.097(a)(2). Such orders remain in effect until the court no longer has jurisdiction over the defendant.

In addition, Pen C §646.92(a) requires the appropriate corrections official or county sheriff to give notice at least 15 days before any person convicted of stalking under Pen C §646.9 or convicted of a felony offense involving domestic violence, as defined in Fam C §6211, is released from state prison or county jail. On request, the notice must be given to any person identified by the court as a victim of the offense, a family member of the victim, or a witness to the offense. Pen C §646.92(a). The notification must be made by telephone and by certified mail at the person's last known address. See Pen C §646.92(a).

To be entitled to notice under Pen C §646.92(a), the victim, family member, or witness must keep the Department of Corrections and Rehabilitation or county sheriff informed of a current mailing address and telephone number. However, a victim may designate another person for purposes of receiving notification. Pen C §646.92(a). In addition, all information relating to a person receiving notice under Pen C §646.92 must remain confidential. See Pen C §646.92(b). Release is defined to include escape, parole, or probation, or release because time has been served. Pen C §646.92(c).

§6.14 E. Family's Economic Support

In cases where imprisonment in a state facility is not warranted, but a period of local confinement is appropriate, and incarceration of a convicted batterer would deprive the family of economic support, the court may consider commitment to a work furlough program under Pen C §1208(b). Such a program may include job training; vocational and educational training; and psychological, substance abuse, or other rehabilitative counseling; or daytime care for the prisoner's children. See Pen C §1208(j)(1), (3), (4). The court should review the victim's impact statement to determine whether the concern for the family's economic support is shared by the victim. In some cases, fear of the defendant outweighs the concern for economic support.

Rehabilitative counseling is also authorized as part of work furlough programs. Pen C §1208(j)(1). If the court orders such counseling in a domestic violence case as a term of probation, the court must refer the defendant only to certified batterer's treatment programs. See Pen C §§273.5(e), 1203.097(c).

§6.15 F. Impact on Children

In many domestic violence cases, children are witnesses to or are the direct victims of the violence. *People v Burton* (2006) 143 CA4th 447, 456, 49 CR3d 334; see Welf & I C §18290. See, *e.g.*, *People v Nevill* (1985) 167 CA3d 198, 203-204, 212 CR 898 (16-month-old child witnessed father shoot and kill mother). Children may suffer emotional trauma as a result of witnessing the violence and may benefit from counseling. Jaffe, Lemon, and Poisson, Child Custody and Domestic Violence: A Call for Safety and Accountability (Sage, 2002). When possible, the costs of counseling victims of domestic violence should be borne by the defendant. See Pen C §1202.4(f)(3)(C); U.S. Attorney General's Task Force on Family Violence, Final Report, pp 35-36 (Washington, D.C.: Department of Justice, 1984).

In addition, strict limitations may need to be placed on the defendant's contact with the children, although criminal courts do not have authority to issue custody or visitation orders. Their authority is limited to ordering restrictions on preexisting custody or visitation arrangements. See §§3.9-3.10.

§6.16 G. Victim's Desires Regarding the Relationship

Despite the provision in Pen C §1191.1 for the victim's desires to be taken into account in sentencing the defendant, the victim's desire to continue the relationship with the batterer does not bar prosecution of the defendant, nor does it bar incarceration, or the issuance of protective orders limiting contact between the defendant and the victim. See, *e.g., People v Jungers* (2005) 127 CA4th 698, 704-705 n3, 25 CR3d 873 (although victim stated she wanted contact with defendant and did not fear him, protective order prohibiting defendant from initiating contact was valid); *People v Jenkins* (1994) 29 CA4th 287, 294, 34 CR2d 483 (victim did not want defendant-boyfriend arrested for beating her).

III. PUNISHMENT FOR DOMESTIC VIOLENCE OFFENSES

A. Corporal Injury to Spouse, Cohabitant, or Co-Parent: Pen C §273.5

§6.17 1. Statutory Provisions

Any person found guilty of corporal injury under Pen C §273.5 is punishable by imprisonment in state prison for two, three, or four years, or in county jail for up to one year, or by a fine of up to $6000, or by both a fine and imprisonment. Pen C §273.5(a). If the court grants probation to a person convicted under Pen C §273.5(a), the terms of probation must be consistent with the provisions of Pen C §1203.097. Pen C §273.5(f).

A person convicted of violating Pen C §273.5 for acts occurring within seven years of a previous conviction under Pen C §273.5 or other specified offenses must be punished by imprisonment in a county jail for not more than one year, or by imprisonment in state prison for two, four, or five years, or by both imprisonment and a fine of up to $10,000. Pen C §273.5(e)(1). Similarly, a person convicted of violating Pen C §273.5 for acts occurring within seven years of a previous conviction for battery under Pen C §243(e) must be punished by imprisonment in state prison for two, three, or four years, or in county jail for up to one year, or by a fine of up to $10,000, or by both that imprisonment and fine. See Pen C §273.5(e)(2).

If probation is granted or the execution or imposition of a sentence is suspended for a defendant convicted under Pen C §273.5(a) who has been convicted of a prior offense specified in Pen C §273.5(e), the court must impose one of the following conditions of probation in addition to the provisions contained in Pen C §1203.097 (Pen C §273.5(g)):

(1) If the defendant has one prior conviction within the previous seven years for any offense specified in Pen C §273.5(e), imprisonment in county jail for no less than 15 days.

(2) If the defendant has two or more prior convictions within the previous seven years for an offense specified in Pen C §273.5(e), imprisonment in county jail for no less than 60 days.

However, on a showing of good cause, the court may find that mandatory imprisonment as required by Pen C §273.5(g) should not be imposed, but must state on the record its reasons for finding good cause. Pen C §273.5(g)(3).

In lieu of imposing a fine, the court may require a defendant placed on probation for violating Pen C §273.5(a), to make payments up to a maximum of $5000 to a battered women's shelter under Pen C §1203.097. See Pen C §273.5(h)(1). Similarly, the court may require a defendant to reimburse the victim for reasonable costs of counseling and other expenses the court finds are the direct result of the offense. See Pen C §273.5(h)(2). The court must make a determination of the defendant's ability to pay before imposing an order to pay a fine, make payments to a shelter, or pay restitution as a condition of probation under Pen C §273.5. See Pen C §273.5(h).

On a conviction of Pen C §273.5(a), the court must also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. Pen C §273.5(i). The length of the restraining order should be based on the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. Pen C §273.5(i). The protective order may be issued by the court whether the defendant is sentenced to state prison or county jail, or if imposition of sentence is suspended and the defendant is placed on probation. Pen C §273.5(i).

For discussion of probation conditions under Pen C §1203.097, see §§6.26-6.27.

§6.18 2. Case Law

Several cases have examined the effect of California's "three strikes" law, Pen C §667, on spousal abuse convictions. In *People v Kinsey* (1995) 40 CA4th 1621, 47 CR2d 769, the defendant argued that his sentence of 29-years-to-life imprisonment on the Pen C §273.5 conviction was unwarranted because the three-strikes legislation under which he was sentenced was invalid, unconstitutionally vague, and cruel and unusual punishment. The court rejected all three arguments and upheld the sentence. 40 CA4th at 1624, 1629-1631. Because the defendant had served three separate prison terms on felony convictions before the attempted assault on his girlfriend, had violated parole, and had been convicted previously for assaulting the same girlfriend in the head when she was pregnant with another child of his, the judgment was affirmed. 40 CA4th at 1631.

In *People v Vessell* (1995) 36 CA4th 285, 42 CR2d 241, the defendant pleaded no contest to a felony charge for punching his girlfriend and shoving her against a wall in violation of Pen C §273.5. Defendant also had a prior conviction for assault with a firearm, for which he had served prison time. The trial court sentenced the defendant to a year in county jail after a waiver of credit for time served, and granted probation. 36 CA4th at 287-288. The prosecution appealed, arguing that the defendant's plea to a felony brought him under the three-strikes law, which mandated a state prison term, and thus restricted the court's power to reduce the defendant's sentence to a misdemeanor. 36 CA4th at 288. The court of appeal disagreed and upheld the misdemeanor sentence, reasoning that the trial court retained discretion to classify crimes as felonies or misdemeanors despite "three strikes," and that the determination of whether a crime is a felony or misdemeanor for "three strikes" is made at the time of sentencing, not at the time of the plea. 36 CA4th at 290-291. Thus, the trial court properly reduced defendant's sentence based on consideration of the facts, and because the defendant was not convicted of a felony, "three strikes" did not apply. 36 CA4th at 294.

The Supreme Court agreed with *Vessell* in *People v Superior Court* (Alvarez) (1997) 14 C4th 968, 974-975, 60 CR2d 93, although it cautioned "that any exercise of such authority must be an intensely fact-bound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration." Moreover, the record must reflect that inquiry. 14 C4th at 981-982.

A criminal defendant does not have a state or federal constitutional right at a hearing to determine the amount of restitution under Pen C §273.5(h) to call as a witness and cross-examine the psychotherapist who provided counseling to the victim. *People v Cain* (2000) 82 CA4th 81, 84, 88, 97 CR2d 836. The scope of a defendant's due process rights at a hearing to determine the amount of restitution is limited: The defendant's due process rights are protected when the probation report gives notice of the amount of restitution claimed, and the defendant has an opportunity to challenge the figures in the report at the sentencing hearing. Moreover, a defendant does not have a Sixth Amendment right of confrontation at the sentencing stage of a criminal prosecution. 82 CA4th at 86.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.19 B. Simple Battery Against Spouse, Cohabitant, or Co-Parent: Pen C §243(e)

§6.19 B. Simple Battery Against Spouse, Cohabitant, or Co-Parent: Pen C §243(e)

A battery against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, a former spouse, fiancé or fiancée, or a person with whom the defendant had or has a dating or engagement relationship, is punishable by a fine of up to $2000, or up to a year in county jail, or both. See Pen C §243(e)(1). The term "dating relationship" is defined as frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement, independent of financial considerations. Pen C §243(f)(10). The court must give special consideration when imposing a sentence under Pen C §243(e) to display society's condemnation for crimes of violence on victims with whom a close relationship has been formed. See Pen C §243(e)(4).

If the court grants probation or suspends sentence, it must order that defendant participate for at least one year in, and successfully complete, a batterer's treatment program as defined in Pen C §1203.097. If no such treatment program is available, the court must order defendant to participate in and complete another appropriate counseling program. Pen C §243(e)(1). The same restrictions apply as in Pen C §273.5 with respect to ability to pay, noninterference with child support, and exhaustion of separate property before community property is used. See Pen C §243(e)(2); for discussion of sentencing under Pen C §273.5, see §§6.17-6.18. Repeat offenders must be imprisoned for at least 48 hours, unless good cause is shown. See Pen C §243(e)(3).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/ C. Stalking: Pen C §646.9/§6.20 1. Statutory Provisions

C. Stalking: Pen C §646.9

§6.20 1. Statutory Provisions

Penal Code §646.9 specifies punishment for conviction of the crime of stalking, with increased sentences for repeated violations when there is an existing protective order and a prior conviction. Thus, a person found guilty of stalking is punishable by imprisonment in county jail for up to one year, or by a fine of up to $1000, or by both that fine and imprisonment, or by imprisonment in state prison. Pen C §646.9(a). A person found guilty of stalking when there is a temporary restraining order, injunction, or any other court order in effect, prohibiting the behavior in Pen C §646.9(a) against the same party, may be punished by imprisonment in state prison for two, three, or four years. Pen C §646.9(b). See *People v Corpuz* (2006) 38 C4th 994, 44 CR3d 360 (probationary stay-away order is a qualifying court order within the meaning of Pen C §646.9(b)).

A second or subsequent violation of Pen C §646.9(a) following a prior felony conviction for stalking is punishable by imprisonment in state prison for two, three, or four years. See Pen C §646.9(c)(2). A person found guilty of stalking after having been convicted of a felony under Pen C §273.5, §273.6, or §422 is punishable by imprisonment in county jail for up to one year, or by a fine of up to $1000, or by both that fine and imprisonment, or by imprisonment in state prison for two, three, or five years. Pen C §646.9(c)(1).

If the court grants probation to defendant, the court is required to order that defendant participate in counseling unless good cause for not making the order is shown. See Pen C §646.9(j). The court must also consider issuing an order restraining defendant from any contact with the victim. Such orders may remain valid for up to ten years, as determined by the court. Pen C §646.9(k)(1). The length of the restraining order should be based on the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. Pen C §646.9(k)(1). The restraining order may be issued by the court whether the defendant is sentenced to state prison or county jail, or if imposition of sentence is suspended and the defendant is placed on probation. Pen C §646.9(k)(2).

If appropriate, the court may also recommend that the Department of Corrections and Rehabilitation certify that the defendant is suitable for rehabilitation treatment at a state hospital as provided in Pen C §2684. On certification, the defendant must be evaluated and transferred to the appropriate hospital for treatment. Pen C §646.9(m). In addition to the penalties described above, the court may order a defendant convicted of felony stalking to register as a sex offender under Pen C §290.006, which requires that the offense be committed as a result of sexual compulsion or for purposes of sexual gratification. Pen C §646.9(d).

§6.21 2. Case Law

A defendant convicted of felony stalking who has a prior felony conviction for stalking is not subject to both a two-year sentence under Pen C §646.9(a) and a three-year sentence under Pen C §646.9(c)(2). *People v Markley* (2006) 138 CA4th 230, 244, 41 CR3d 257. Penal Code §646.9(c)(2) does not provide that punishment under that section is in addition to the punishment for stalking imposed under Pen C §646.9(a). Rather, Pen C §646.9(c)(2) provides an alternative sentencing scheme if the defendant has a previous stalking conviction. 138 CA4th at 244.

A stay-away condition of probation imposed as a sentence following a defendant's prior conviction for spousal battery is a qualifying court order within the meaning of Pen C §646.9(b), which permits imprisonment in state prison for any person who violates Pen C §646.9(a) while under a temporary restraining order, injunction, or another court order. *People v Corpuz* (2006) 38 C4th 994, 44 CR3d 360. The plain language of the relevant condition, "or any other court order," includes a stay-away order issued as a condition of probation. 38 C4th at 997.

In *People v Marchand* (2002) 98 CA4th 1056, 120 CR2d 687, the defendant was convicted in a court trial of stalking two young women and of misdemeanor violations of a protective order under Pen C §273.6. On request by the prosecutor during sentencing, the court ordered defendant to register as a sex offender under former Pen C §290(a)(2)(E) (now Pen C §290.006). 98 CA4th at 1059. On appeal, defendant argued that his Fourteenth Amendment right to due process was violated under *Apprendi v New Jersey* (2000) 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435, because the trial court did not find beyond a reasonable doubt the facts triggering the registration requirement. *People v Marchand, supra,* 98 CA4th at 1060. The court of appeal disagreed, holding that the sex offender registration requirement does not constitute a punishment or penalty within the meaning of *Apprendi*. Therefore, when the prosecution seeks registration under former Pen C §290(a)(2)(E), due process does not demand that the facts necessary to impose registration be alleged in the information or proven beyond a reasonable doubt. 98 CA4th at 1061-1065.

§6.22 D. Criminal Threats: Pen C §422

A defendant found guilty of criminal threats is punishable by imprisonment for up to one year in county jail, or by imprisonment in state prison. Pen C §422. If the victim falls within the definition of "domestic violence" in Fam C §6211, and defendant receives a probationary term in addition to or instead of incarceration, the terms of probation must include the provisions of Pen C §1203.097. See Pen C §1203.097(a); §§6.26-6.27.

A defendant's convictions for two counts of making criminal threats and for arson arising from an incident in which defendant left threatening messages on his former girlfriend's answering machine, then set fire to her apartment an hour later, were based on multiple and divisible acts with distinct objectives rather than a single act or omission. *People v Solis* (2001) 90 CA4th 1002, 1021-1022, 109 CR2d 464 (prosecution under prior version of Pen C §422 termed "terrorist threats"); see *Neal v State* (1960) 55 C2d 11, 19, 9 CR 607 (multiple punishment is proper if defendant entertained multiple criminal objectives independent of each other). Accordingly, in sentencing defendant on both the arson and criminal threat convictions, the trial court did not violate Pen C §654, which prohibits multiple punishment for a single act or omission even when the act or omission violates more than one statute and constitutes more than one crime. *People v Solis, supra,* 91 CA4th at 1021-1022. The fact that the arson occurred one hour later indicates that the crimes were divisible. In addition, in making terrorist threats, defendant intended to frighten, whereas in committing arson, he intended to burn. 91 CA4th at 1022.

§6.23 E. Spousal Rape: Pen C §262

The punishment for spousal rape, as defined in Pen C §262, is imprisonment for three, six, or eight years in state prison. Pen C §264(a). Additionally, the judge may impose a fine of up to $70 for an AIDS education program if the court finds that defendant is able to pay. See Pen C §264(b). Additionally, the court must order the defendant to undergo an AIDS test if convicted of spousal rape under Pen C §262. See Pen C §1202.1(a), (e)(3).

If the court orders probation, the conditions may include, in lieu of a fine, payments of up to $1000 to a battered women's shelter, and/or that defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of defendant's offense. Pen C §262(d). Before ordering such conditions, the court must make a determination of the defendant's ability to pay. In addition, such payments cannot be ordered if they would jeopardize the defendant's ability to pay court-ordered child support or restitution. See Pen C §262(d). When injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of Pen C §262, community property may not be used to discharge the defendant's liability for restitution to the injured spouse. Pen C §262(d).

The provisions of Pen C §1203.097 apply if probation is granted, because the victim falls within the Fam C §6211 definition of a domestic violence victim. See Pen C §1203.097(a); §1.2. Note that there is a discrepancy in the amount of the fine payable to a battered women's shelter. Penal Code §262(d) authorizes payment of up to $1000; Pen C §1203.097(a)(11)(A) authorizes payment of up to $5000.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.24 F. Threat Because of Prosecution Assistance: Pen C §140

§6.24 F. Threat Because of Prosecution Assistance: Pen C §140

A person found guilty of willfully using force or violence, or threatening to use force or violence, on a witness or victim of a crime or another person because the person assisted in a criminal or juvenile court proceeding is punishable by imprisonment in county jail for up to one year, or by imprisonment in state prison for two, three, or four years. Pen C §140(a). The statute also applies to threats to take, damage, or destroy the property of a witness, victim, or other person. See Pen C §140(a). A person punished under some other provision of law for acts described in Pen C §140(a) cannot receive additional imprisonment under Pen C §140. Pen C §140(b).

V. GRANTING PROBATION

§6.25 A. Setting Probationary Terms

Judges usually have considerable discretion in fashioning the terms of probation. A condition of probation will not be held invalid unless it: (1) has no relationship to the crime of which the offender was convicted; (2) relates to conduct that is not in itself criminal; and (3) requires or forbids conduct that is not reasonably related to future criminality. *People v Delgado* (2006) 140 CA4th 1157, 1163, 45 CR3d 501, citing *People v Lent* (1975) 15 C3d 481, 486, 124 CR 905 (superseded on another ground by Proposition 8 as stated in 4 C4th 284, 290-295). Conversely, a condition of probation that requires or forbids conduct that is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality. *People v Lent, supra,* 15 C3d at 486; *People v Jungers* (2005) 127 CA4th 698, 702, 25 CR3d 873.

However, when a trial court grants probation in a case involving domestic violence, Pen C §1203.097 requires the court to impose numerous mandatory conditions of probation. See Pen C §1203.097(a); for discussion of mandatory conditions, see §6.26. Similarly, if the court grants probation to a person who has violated firearm restrictions in a protective order under Pen C §12021(g), the conditions of probation must be consistent with Pen C §1203.097. See Pen C §12021(g)(4). For purposes of Pen C §1203.097, "domestic violence" is defined by reference to Fam C §6211. See §1.2.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.26 1. Mandatory Probation Conditions Under Pen C §1203.097(a)

§6.26 1. Mandatory Probation Conditions Under Pen C §1203.097(a)

When a court grants probation for a crime in which the victim is a person defined in Fam C §6211, Pen C §1203.097 requires the court to impose several conditions of probation, including participation in a batterer's counseling program. Pen C §1203.097(a), (b); for discussion of Fam C §6211, see §1.2. The application of Pen C §1203.097 is broad. It is not limited to Pen C §§243(e), 273.5, 262, and other crimes that expressly target domestic violence victims. Rather, the statute is applicable to any crime where the victim is identified in Fam C §6211. *People v Cates* (2009) 170 CA4th 545, 549-551, 87 CR3d 919 (trial court properly imposed the mandatory probation conditions of Pen C §1203.097 on a defendant convicted of felonious assault (Pen C §245(a)(1)) on his former girlfriend). See also *People v Selga* (2008) 162 CA4th 113, 117-120, 75 CR3d 453 (defendant convicted of stalking (Pen C §646.9(a)) his former girlfriend; Pen C §1203.097 protective order erroneously issued to protect current boyfriend of the victim; the boyfriend was not a person defined in Fam C §6211; trial court, however, could have issued protective order on behalf of the victim).

In every domestic violence case in which probation is granted, Pen C §1203.097 mandates that the court include all the following conditions:

(1) A minimum period of probation of 36 months, which may include a period of summary probation as appropriate. Pen C §1203.097(a)(1).

(2) A criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and if appropriate, containing residence exclusion or stay-away conditions. Pen C §1203.097(a)(2); see Judicial Council form CR-160.

Judicial Tip: The 2005 California Attorney General's Task Force On Local Criminal Justice Response to Domestic Violence report, *Keeping the Promise: Victim Safety and Batterer Accountability*, found that courts in 17 counties were not imposing such orders or were not ensuring their timely entry into the Domestic Violence Restraining Order System (DVROS). The report found three reasons for noncompliance (p 21):

- Some courts did not understand that criminal protective orders were required when domestic violence offenders were sentenced to probation;
- Most courts failed to understand their statutorily required leadership role in ensuring the entry of criminal protective orders into DVROS; and
- In some counties, a lack of cooperation between the courts and other criminal justice agencies hindered criminal protective orders data entry into DVROS.

The report stressed that courts must impose criminal protective orders on all domestic violence offenders sentenced to probation and must ensure that all orders, whether imposed during prosecution or sentencing, are entered into DVROS within one business day (p 24).

(3) Notice to the victim of the disposition in the case. Pen C §1203.097(a)(3). See §6.33.

(4) Booking defendant within one week of sentencing if he or she has not already been booked. Pen C §1203.097(a)(4).

(5) Minimum payment by defendant of at least $400 to be disbursed as specified in Pen C §1203.097(a)(5), unless the court finds, after a hearing on the record, that defendant does not have the ability to pay, in which case the court may reduce or waive this fee. Pen C §1203.097(a)(5).

(6) Successful completion of a batterer's program as defined in Pen C §1203.097(c), or if none is available, another appropriate counseling program designated by the court, for a period of at least one year. Pen C §1203.097(a)(6).

(7) An order to comply with all probation requirements, including attending counseling, keeping program appointments, and paying program fees based on the ability to pay. Pen C §1203.097(a)(7).

(8) An order requiring defendant to perform a specified amount of appropriate community service, as designated by the court, with proof of completion. Pen C §1203.097(a)(8). (Some judges have made innovative community service orders, *e.g.,* one Los Angeles judge ordered a domestic violence defendant to produce a videotape on domestic

violence in the Asian community.)

(9) An order requiring additional attendance by defendant in a batterer's program throughout the probationary period if the program so recommends, unless the court finds that this is not in the interests of justice. Pen C §1203.097(a)(10)(A). See §6.31.

Judicial Tip: The court should not accept plea agreements that allow batterers to avoid what is mandatory under Pen C §1203.097: 52-week batterer intervention programs and three-year probationary terms. The 2005 California Attorney General's Task Force On Local Criminal Justice Response to Domestic Violence report, *Keeping the Promise: Victim Safety and Batterer Accountability*, found that this was a fairly widespread practice. As stated in the report (p 64):

> These agreements attempt to avoid the requirements of Pen C §1203.097 by having defendants plead guilty to "non-domestic violence" crimes, such as assault or trespass. The agreements, however, still violate the spirit, if not the letter, of the law… [R]egardless of whether the crime is a "domestic violence" crime, the defendant must undergo three years of probation and the batterer's program if the victim of the crime is one of the people listed in Family Code §6211…

A trial court did not abuse its discretion by requiring that defendant attend counseling, pay a domestic violence fine, and make a payment to a battered woman's shelter under Pen C §1203.097, after defendant was found guilty of vandalizing his wife's car and sentenced to probation. *People v Brown* (2001) 96 CA4th Supp 1, 39-40, 117 CR2d 738. The defendant argued that his spouse was not the victim of the vandalism count; rather, the car was the victim. The court of appeal concluded that the only reasonable inference from the evidence was that defendant's wife was a victim of vandalism in a domestic violence setting. 96 CA4th Supp at 39. Moreover, the court concluded that even if the provisions were not mandatory, they were clearly within the trial court's discretion. 96 CA4th Supp at 40.

§6.27 2. Discretionary Probation Conditions Under Pen C §1203.097(a)

In addition to the mandatory probation conditions listed in §6.26, Pen C §1203.097(a) specifies that the court has discretion to include the following conditions:

- Concurrent with other terms, enrollment in a chemical dependency program, paid for by the defendant, unless prohibited by the referring court. Pen C §1203.097(a)(10)(C).
- In lieu of a fine, but not in lieu of the fund payment described in Pen C §1203.097(a)(5):
- Payment of up to $5000 to a battered women's shelter (Pen C §1203.097(a)(11)(A)); and/or
- Reimbursement of the victim for reasonable expenses that the court finds are the direct result of the offense. Pen C §1203.097(a)(11)(B).

As a prerequisite to ordering defendant to pay a fine, to make payments to a battered women's shelter, or to pay restitution as a condition of probation under Pen C §1203.097(a)(11), the court must make a determination of the defendant's ability to pay. Pen C §1203.097(a)(11). In addition, payments to a shelter must not be ordered if this compromises the defendant's ability to pay direct restitution to the victim or to pay child support. See Pen C §1203.097(a)(11). Moreover, when injury to a married person is caused, in whole or in part, by the criminal acts of defendant, defendant's separate property must be exhausted before community property can be used. Pen C §1203.097(a)(11).

Penal Code §1203.097(a)(11) is silent as to who is entitled to designate the recipient of a payment to a battered women's shelter. However, this provision should not be interpreted to permit a trial judge to designate his or her favorite shelter as a recipient of such payments. Such an interpretation would run afoul of the California Code of Judicial Ethics. *In re Wagner* (2005) 127 CA4th 138, 147, 25 CR3d 201; see Cal Rules of Ct, Code of Judicial Ethics, Canon 2B(2) (judge must not lend prestige of judicial office to advance pecuniary or personal interests of others); Cal Rules of Ct, Code of Judicial Ethics, Canon 4C(3)(d)(iv) (judge must not permit use of prestige of judicial office for fund raising). Thus, courts must devise a method of implementing Pen C §1203.097(a)(11)(A) that removes responsibility for designating specific charities from the individual judge imposing probation. 127 CA4th at 147. One such method would be to order the funds paid to a court-administered domestic violence fund, and have a committee of judges who are not directly involved in sentencing persons guilty of domestic violence determine how the funds should be distributed within the framework of Pen C §1203.097(a)(11)(A). 127 CA4th at 147.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/ 3. Procedures Under Pen C §1203.097/§6.28 a. Enrollment; Unsuitability of Defendant

3. Procedures Under Pen C §1203.097

§6.28 a. Enrollment; Unsuitability of Defendant

The probation department must make an investigation to determine which batterer's program would be appropriate for the defendant. Pen C §1203.097(b)(1). In conducting the investigation, the probation department must take into consideration the defendant's age; medical history; employment and service records; educational background; community and family ties; prior incidents of violence; police report; treatment history, if any; demonstrable motivation; and other mitigating factors. See Pen C §1203.097(b)(1). The probation department must report its findings and recommendations to the court and must provide this information to a batterer's program if requested. Pen C §1203.097(b)(1).

The court must advise the defendant of the need to report to the probation department for the initial investigation and must advise the defendant that failure to do so, or the failure to enroll in a specified program as directed by the court or the probation department, will result in possible further incarceration. See Pen C §1203.097(b)(2). In the interest of justice, the court may relieve a defendant from this requirement based on mistake or excusable neglect. Application for such relief must be filed within 20 court days of the missed deadline, with a copy served on the prosecutor's office. See Pen C §1203.097(b)(2).

The defendant must file proof of enrollment in a batterer's program with the court within 30 days of conviction. Pen C §1203.097(a)(10)(B). The defendant must attend consecutive weekly sessions of the program unless granted an excused absence for good cause by the program for no more than three individual sessions during the entire program. The defendant must complete the program within 18 months. Pen C §1203.097(a)(6). However, after a hearing, the court may modify the consecutive attendance or completion requirements on a finding of good cause. See Pen C §1203.097(a)(6).

After the court orders a defendant to a batterer's program, the probation department must conduct an initial assessment of the defendant. Pen C §1203.097(b)(3). That assessment must include the defendant's social, economic, and family background; education; vocational achievements; criminal history; medical history; substance abuse history; consultation with the probation officer; verbal consultation with the victim, if the victim desires to participate; and an assessment of the future probability that defendant will commit murder. See Pen C §1203.097(b)(3).

If a defendant is found unsuitable for a batterer's program, the program must immediately contact the probation department or the court. The probation department or the court must then either recalendar the case for hearing, or must refer defendant to an appropriate alternative batterer's program. Pen C §1203.097(a)(9).

§6.29 b. Progress Reports and Hearings

Penal Code §1203.097 requires the batterer's program to provide periodic progress reports to the court every three months or less. See Pen C §1203.097(a)(6). These reports must include information on attendance, fee payment history, and program compliance. Pen C §1203.097(c)(1)(O)(ii). Although the statute does not state that hearings must be calendared to receive these reports, many judges do so and require the defendant's presence to impress on the defendant the importance of compliance with the terms of probation and to remind him or her that the court is monitoring his or her progress. It is in the court's discretion to decide how frequently to schedule progress report hearings; no statute or case specifies the frequency of reports. However, because the program is required to submit reports at least every three months, this may be an appropriate interval for progress hearings.

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.30 c. Payment of Program Fee

§6.30 c. Payment of Program Fee

The batterer's program must use a sliding fee schedule based on defendant's ability to pay the program fee. Payment of the fee must be made a condition of probation if the court determines that the defendant has the present ability to pay the fee. The defendant must pay the fee during the term of probation unless the program sets other conditions. An indigent defendant may negotiate a deferred payment schedule, but then must pay a nominal fee if he or she has the ability to do so. On a hearing and a finding by the court that the defendant does not have the financial ability to pay a nominal fee, the court must waive this fee. Pen C §1203.097(c)(1)(P).

§6.31 d. Further Counseling Beyond One Year

If a batterer's program recommends further counseling beyond the one-year minimum, the court must require defendant to participate in additional sessions throughout the probationary period, unless the court finds that it is not in the interests of justice to do so, states its reasons on the record, and enters them into the minutes. Pen C §1203.097(a)(10). In deciding whether a defendant would benefit from more sessions, the court must consider whether the defendant (Pen C §1203.097(a)(10)):

(1) Has been violence-free for a minimum of six months.

(2) Has cooperated and participated in the batterer's program.

(3) Demonstrates an understanding of and practices positive conflict resolution skills.

(4) Blames, degrades, or has committed acts that dehumanize the victim or put the victim's safety at risk (*e.g.,* molesting, stalking, striking, attacking).

(5) Demonstrates an understanding that use of coercion or violent behavior to maintain dominance is unacceptable in an intimate relationship.

(6) Has made threats of harm to anyone.

(7) Has complied with applicable requirements to obtain drug or alcohol counseling, or both.

(8) Demonstrates acceptance of responsibility for the abusive behavior he or she perpetrated against the victim.

§6.32 e. Re-Offenses; Unsatisfactory Performance in Program; Termination

The program must immediately report any violation of the terms of the protective order, including any new acts of violence or failure to comply with the program requirements, to the court, to the prosecutor, and if formal probation has been ordered, to the probation department. Pen C §1203.097(a)(10)(B). In addition, the program must notify the court and the probation department, in writing, within the period of time and in the manner specified by the court, of any person who fails to complete the program. Notification also must be given if the program determines that the defendant is performing unsatisfactorily or if the defendant is not benefiting from the education, treatment, or counseling. Pen C §1203.097(c)(3)(C).

Regular in-person progress report hearings, as recommended in §6.29, will help the court learn of any problems with defendant's failure to comply.

If it appears to the prosecutor, the court, or the probation department that defendant is performing unsatisfactorily in the assigned program, is not benefiting from counseling, or has engaged in criminal conduct, on request of the probation officer, the prosecuting attorney, or on its own motion, the court, as a priority calendar item, must hold a hearing to determine whether further sentencing should proceed. Pen C §1203.097(a)(12). In determining whether further sentencing should proceed, the court may consider factors, including, but not limited to, any violence by the defendant against the former or a new victim while on probation and noncompliance with any other specific condition of probation. See Pen C §1203.097(a)(12). If the court finds that the defendant is not performing satisfactorily in the assigned program, is not benefiting from the program, has not complied with a condition of probation, or has engaged in criminal conduct, the court must terminate the defendant's participation in the program and must proceed with further sentencing. Pen C §1203.097(a)(12).

An exit interview will be conducted to assess the defendant's progress during the program. Pen C §1203.097(c)(7). The program will submit a final written evaluation, with a recommendation for either successful or unsuccessful termination or continuation in the program. Pen C §1203.097(c)(1)(O)(iii).

The 2005 California Attorney General's Task Force On Local Criminal Justice Response to Domestic Violence report, *Keeping the Promise: Victim Safety and Batterer Accountability*, found the most common judicial sanction when courts were faced with noncompliant batterers (usually from unexcused absences) was to merely re-enroll the batterer in another program, numerous times if necessary. "Re-enrollment means that there are virtually no consequences for a batterer who does not comply with attendance requirements. The lack of consequences is complete when judges give re-enrolled batterers credit for sessions attended in the previous program, and some judges do precisely that" (pp 6, 71). The Task Force recommended that in each county, the court, in consultation with the probation department and the prosecutor's office, develop a strategy to ensure that multiple re-enrollments do not take place without additional and graduated sanctions, *e.g.*, jail time (p 71).

Additionally, the Task Force recommended that the court and probation department in each county immediately develop standards and procedures for collecting, measuring, and evaluating batterer intervention program enrollment rates, completion rates, and recidivism rates; the reasons for noncompletion; and judicial responses to noncompliance (pp 7, 72). They further recommended the development of a Judicial Council form for criminal courts to use in monitoring batterers' progress while on probation (pp 66, 91), and the development of fields regarding this information in the Administrative Office of the Courts' statewide Criminal Case Management System (pp 66, 91).

The *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases* (Judicial Council of California/AOC 2008) also recommends that courts use graduated sanctions for probation violations (p 42):

> Graduated sanctions take into the account the totality of the circumstances of the defendant's performance and progress while on probation, as well as the impact on the victim. By using graduated sanctions, the court maintains discretion and flexibility in addressing the unique circumstances in each case.

§6.33 4. Notice to Victim

The victim in a domestic violence case must be notified of the disposition of the case. Pen C §1203.097(a)(3).

Judicial Tip: Prosecutors should provide this notice because they have (or have access to) the victim's address, and the court often does not. Moreover, if the court were to give this notice, the notice, including the victim's address, could become a publicly accessible court record. *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases,* p 40 (Judicial Council of California/AOC 2008).

Additionally, the probation department must attempt to notify the victim regarding the requirements for the defendant's participation in the batterer's program, as well as the resources available to the victim. The victim must also be informed that defendant's attendance in any program does not guarantee that an abuser will not be violent. Pen C §1203.097(b)(4), (c)(1)(D).

§6.34 5. Batterer's Program Standards

Penal Code §1203.097 sets very specific batterer's program standards. See Pen C §1203.097(c). The probation department must design and implement an approval and renewal process for batterer's programs to be eligible to receive referrals under Pen C §1203.097. See Pen C §1203.097(c). The court and the probation department are prohibited from referring defendants to programs that do not meet the specified standards. Pen C §1203.097(c)(2). In addition, a person who works as a facilitator in a batterers' intervention program under Pen C §1203.097(c) must complete certain requirements before being eligible to work as a facilitator in the program. See Pen C §1203.098.

The goal of a batterer's program under Pen C §1203.097 is to stop domestic violence. Pen C §1203.097(c)(1). No program can be approved unless it meets all of the following standards (Pen C §1203.097(c)(3)):

(1) The establishment of guidelines and criteria for education services, which may include lectures, classes, and group discussions.

(2) Supervision of the defendant for the purpose of evaluating his or her progress in the program.

(3) Adequate reporting requirements to ensure that, after being ordered to attend and complete a program, a person may be identified for failure to enroll in or to successfully complete the program, or for successful completion of the program as ordered.

(4) No victim can be compelled to participate in a program or counseling, and no program may condition a defendant's enrollment on participation by the victim.

The program must also include the components set forth in Pen C §1203.097(c)(1). Thus, the program must include strategies to hold the defendant accountable for the violence in a relationship, including providing the defendant with a written statement that the defendant must be held accountable for acts or threats of domestic violence. Pen C §1203.097(c)(1)(A). The program must also require that the defendant participate in ongoing same-gender group sessions (Pen C §1203.097(c)(1)(B), (d)), and that the defendant attend those sessions free of chemical influence (Pen C §1203.097(c)(1)(E), (K)).

The program's educational programming must examine, at a minimum, gender roles, socialization, the nature of violence, the dynamics of power and control, and the effects of abuse on children and others. Pen C §1203.097(c)(1)(F). Program content on cultural and ethnic sensitivity is also required. Pen C §1203.097(c)(1)(M).

For defendants who are chronic users or serious abusers of drugs or alcohol, standard components in the program must include concurrent counseling for substance abuse and violent behavior, and in appropriate cases, detoxification and abstinence from the abused substance. Pen C §1203.097(c)(6). See also Pen C §1203.097(a)(10)(C), allowing courts to order defendants into concurrent chemical dependency programs.

§6.35 6. No-Weapons Orders and Warrantless Search Conditions

The California Legislature recognized the high level of danger posed by deadly weapons in domestic violence cases when it authorized law enforcement authorities to temporarily remove from scenes of domestic violence any firearms discovered in consensual or other lawful searches, "for the protection of the peace officer or other persons present." See Pen C §12028.5(b). In a conviction for domestic violence involving a weapon, a no-weapons order and a warrantless search provision should be considered. A warrantless search condition should also be considered if the offense involved substance abuse.

Under 18 USC §922(g)(9), possession of a firearm by anyone convicted of a domestic violence misdemeanor is a federal offense punishable by a fine and/or up to 10 years in prison. 18 USC §924(a)(2). The statute has been upheld as constitutional. See, *e.g.*, *U.S. v Jones* (9th Cir 2000) 231 F3d 508, 513-515; *U.S. v Bayles* (10th Cir 2002) 310 F3d 1302, 1306-1308. A domestic relationship between the defendant and the victim need not be a defining element of the predicate offense to support a conviction for possession of a firearm by a person convicted of misdemeanor crime of domestic violence under 18 USC §922(g)(9). *U.S. v Hayes* (2009) ___ US ___, 129 S Ct 1079, 1084-1089, 172 L Ed 2d 816. See 18 USC §921(a)(32), (33) (defining "intimate partner" and "misdemeanor crime of domestic violence"). The mental state for prosecutions under 18 USC §922(g)(9) is "knowing." See 18 USC §924(a)(2). This requirement refers to knowledge of possession rather than to knowledge of the legal consequences of possession. *U.S. v Hancock* (9th Cir 2000) 231 F3d 557, 563; *Bryan v United States* (1998) 524 US 184, 193, 118 S Ct 1939, 141 L Ed 2d 197. Thus, to convict a defendant under 18 USC §922(g)(9), the prosecution need not prove that defendant knew that it was illegal to possess a gun. *U.S. v Hancock, supra,* 231 F3d at 562-563.

Under Pen C §12021(a), a person who has been convicted of a felony under federal or California law, or under the laws of any other state, government, or country, who owns, purchases, receives, or has in his or her possession, custody, or control a firearm is guilty of a felony. In addition, Pen C §12021(c)(1) prohibits the possession of a firearm by anyone convicted of a misdemeanor offense of specified crimes, including Pen C §§243, 243.4, 273.5, 273.6, and 646.9, for a period of 10 years. A violation of Pen C §12021(a) is punishable by imprisonment in state prison for 16 months, two years, or three years. See Pen C §§12021(a), 18. A violation of Pen C §12021(c)(1) is punishable by imprisonment in state prison or in county jail for up to one year, or by a fine of up to $1000, or both. Pen C §12021(c)(1).

Family Code §6304 requires judges who issue civil restraining orders under the Domestic Violence Prevention Act (Fam C §§6200-6389) to prohibit defendants in these actions from owning, possessing, purchasing, or receiving or attempting to own, possess, purchase, or receive firearms. Family Code §6389 further requires judges to order defendants who are in court for a hearing to turn over any firearms already in their possession to law enforcement or to a certified gun dealer. Fam C §6389(c)(1), (2). Defendants who are not present have 24 hours after service of process to relinquish their firearms. Fam C §6389(c)(2). Violation of either of these provisions would be covered by Pen C §12021(g), a wobbler, and possibly also by Pen C §273.6(c)(3), a misdemeanor. Additionally, such violations are federal offenses under 18 USC §922(g)(8), which prohibits anyone subject to a domestic violence restraining order from possessing a firearm.

§6.36 7. Other Special Orders

Courts can order probationers who are employed to support their dependents, to keep an account of their earnings, to report the amount to the probation officer, and to apply those earnings as directed by the court. Pen C §1203.1(d). In addition, courts can also require a probationer to post a bond for the faithful observance and performance of any of the conditions of probation. Pen C §1203.1(d).

On conviction of any sex offense subjecting the defendant to the sex offender registration requirements of Pen C §290, the court can order as a condition of probation on the victim's request or in the court's discretion, that the defendant stay away from the victim and the victim's residence or place of employment, and that the defendant have no contact with the victim in person, by telephone or electronic means, or by mail. Pen C §1203.1(i)(2).

Under Pen C §1203.1(j), trial courts have broad discretion to impose conditions of probation to foster rehabilitation and reformation of the defendant, to protect the public and the victim, and to ensure that justice is done. For example, a trial court may require that a defendant on probation for stalking submit to periodic polygraph examinations in connection with his or her therapy program. *Brown v Superior Court* (2002) 101 CA4th 313, 319-320, 124 CR2d 43. Such a requirement is reasonably related to the crime of which defendant was convicted and to possible future criminality and does not violate the defendant's rights and privileges under the Fifth and Sixth Amendments to the U.S. Constitution. 101 CA4th at 320. However, an order imposing a polygraph condition must limit the questions allowed to those relating to successful completion of the defendant's therapy program and to the crime of which defendant was convicted. 101 CA4th at 321. Furthermore, the court may order the defendant to pay some or all of the reasonable costs of such examinations, but only after the court makes an inquiry and determination regarding defendant's ability to pay, and issues a separate order for payment of such costs. 101 CA4th at 321-322; see Pen C §1203.1b(a).

Under Pen C §1203.02, the court, in granting probation to a defendant convicted of any offense enumerated in the sex offender registration statute, Pen C §290, may ask whether the defendant was intoxicated at the time of the offense. If the court believes the defendant was intoxicated or addicted to alcohol at the time of or immediately preceding the offense, the court must require that the defendant totally abstain from the use of alcoholic liquor or beverages as a condition of probation. Pen C §1203.02. The court may condition probation on a defendant's abstention in other offenses as well. See Pen C §1203.1(j). See also Pen C §1203.096 (participation in substance abuse counseling program).

The court may not condition probation on banishment of defendant from state in lieu of sentencing. *Alhusainy v Superior Court* (2006) 143 CA4th 385, 390-393, 48 CR3d 914. Such a condition essentially requires a defendant to commit another felony, *i.e.*, flee the jurisdiction to avoid sentencing. 143 CA4th at 393. That condition is thus impermissible, constitutionally improper, and against public policy, and invalidates the defendant's guilty plea. 143 CA4th at 391-393.

§6.37 8. Probation With County Jail Time

In addition to the mandatory minimum jail time required under the specific code sections discussed in §§6.17-6.24, jail time may be mandated by statute for convictions of other crimes that may occur as part of a domestic violence offense. See, *e.g.,* Pen C §1203.095(a) (use of firearm mandates minimum jail time of three or six months).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.38 B. Checklist: Probation Conditions in Domestic Violence Cases

§6.38 B. Checklist: Probation Conditions in Domestic Violence Cases

(a) Mandatory Terms

- Minimum 36 months' probation. Pen C §1203.097(a)(1).
- Completion of court-ordered batterer's treatment in program complying with Pen C §1203.097. Pen C §1203.097(a)(6).
- Criminal court protective order, and if appropriate, a stay-away order. Pen C §1203.097(a)(2).
- Fine of at least $400, on finding of ability to pay. Pen C §1203.097(a)(5).
- Community service. Pen C §1203.097(a)(8).
- Batterer's counseling beyond one year, when recommended by the program, unless the court finds that this is not in the interests of justice. Pen C §1203.097(a)(10)(A).
- Compliance with all terms of probation, including attending appointments and paying fees (if able). Pen C §1203.097(a)(7)(A)(i).
- No-alcohol provision if court finds that defendant who committed offense listed in Pen C §290 was intoxicated or addicted at time of offense. Pen C §1203.02.
- Jail time if restraining order violation results in physical injury (Pen C §§273.6, 273.65), if the violation is a second or later conviction for spousal, cohabitant, or co-parent abuse (Pen C §273.5), or if a firearm was used (Pen C §1203.095).
- Restitution. Pen C §1202.4(a)(3)(B), (f).
- Restitution fine. Pen C §1202.4(a)(3)(A), (b), (c).

(b) Discretionary Terms

- No-weapons orders (note that it is both a federal and state crime for defendants convicted of certain domestic violence offenses to possess a firearm). Pen C §12021(c)(1); 18 USC §922(g)(9).
- Warrantless search conditions.
- Orders to support dependents. Pen C §1203.1(d).
- Prohibition against alcohol (if not intoxicated or addicted at time of offense but abuses alcohol). See Pen C §1203.1(j).
- Prohibition against drug use. See Pen C §1203.1(j).
- Orders to enroll in chemical dependency program. Pen C §1203.097(a)(10)(C).
- Period of incarceration (but see mandatory jail for some offenses, above).
- Instead of fine, payment of up to $5000 to battered women's shelter and/or reimbursement to victim of costs incurred as result of abuse, on finding of ability to pay. Pen C §§273.5, 1203.097(a)(11)(A).
- Posting of bond. Pen C §1203.1(a)(4).

Source: Criminal Law/California Judges Benchbook: Domestic Violence Cases in Criminal Court/6 Sentencing Domestic Violence Offenders/§6.39 C. Limiting or Terminating a Protective Order

§6.39 C. Limiting or Terminating a Protective Order

The court may limit or terminate a protective order that is a condition of probation in a case involving domestic violence as defined by Fam C §6211. Pen C §1203.3(b)(6). In determining whether to limit or terminate the protective order, the court must consider if there has been any material change in circumstances since the crime for which the order was issued, and any issue relating to whether there is good cause for the change, including, but not limited to, whether (Pen C §1203.3(b)(6)(A)-(I)):

- The probationer has accepted responsibility for the abusive behavior perpetrated against the victim.
- The probationer is currently attending and actively participating in counseling sessions.
- The probationer has completed parenting counseling, or attended alcoholics or narcotics counseling.
- The probationer has moved from the state, or is incarcerated.
- The probationer is still cohabiting, or intends to cohabit, with any subject of the order.
- The probationer has performed well on probation, including consideration of any progress reports.
- The victim desires the change, and if so, the victim's reasons, whether the victim has consulted a victim advocate, and whether the victim has prepared a safety plan and has access to local resources.
- The change will impact any children involved, including consideration of any child protective services information.
- The ends of justice would be served by limiting or terminating the order.

Before modifying or terminating a protective order, the prosecuting attorney must be given five days' written notice and an opportunity to be heard. Pen C §1203.3(b)(1).

§6.40 D. Probation Revocation

The court's authority to revoke probation is very broad. The court may revoke probation if the interests of justice so require and the court has reason to believe that the person has violated any of the conditions of probation, has become subject to improper associates or a vicious life, or has subsequently committed other offenses, whether or not the person has been prosecuted for such offenses. Pen C §1203.2(a). However, probation cannot be revoked for failure to make restitution, unless the court determines that the defendant has willfully failed to pay and has the ability to pay. Pen C §1203.2(a).

In domestic violence cases, probation must be revoked if the court finds any of the following (Pen C §1203.097(a)(12)):

(1) Defendant is not performing satisfactorily in the assigned program,

(2) Defendant is not benefiting from the program,

(3) Defendant has not complied with a condition of probation, or

(4) Defendant has engaged in criminal conduct.

Because domestic violence incidents tend to escalate in severity and can result in homicide of the victim, batterer, children, or all of the above, the court should interpret "engaging in criminal conduct" broadly, to include any assaults or threats against the former victim or a new victim.

The trial court also has authority at any time during the probationary term to revoke, modify, or change its order suspending imposition or execution of sentence. See Pen C §1203.3(a), (e). However, the court's authority to revoke, modify, change, or terminate probation under Pen C §1203.3(a) is subject to the conditions set forth in Pen C §1203.3(b).

For example, before the court modifies any sentence or term or condition of probation, it must hold a hearing in open court. Pen C §1203.3(b)(1). In general, the prosecuting attorney must be given a two-day written notice and an opportunity to be heard. See Pen C §1203.3(b)(1). However, before modifying or terminating a protective order in a case involving domestic violence, as defined in Fam C §6211, the prosecuting attorney must be given five days' written notice and an opportunity to be heard. Pen C §1203.3(b)(1). Notice of the intent to revoke, modify, or change a probation order must also be given to the proper probation officer. Pen C §1203.3(b)(2). If the sentence or term or condition of probation is modified under Pen C §1203.3, the judge must state the reasons for that modification on the record. Pen C §1203.3(b)(1)(A).

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