



Unconventional Evidence in Domestic Violence Cases

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Speakers



Hon. Lawrence Riff
Los Angeles Superior Court




Hon. Susan Lopez-Giss (Ret.)
ADR Services, Inc.



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PENAL CODE

SECTION 633.6



PENAL
CODE

a) Notwithstanding the provisions of this chapter, and in accordance with federal law, upon the request of a victim of domestic violence who is seeking a domestic violence restraining order, a judge issuing the order may include a provision in the order that permits the victim to record any prohibited communication made to him or her by the perpetrator.(b) Notwithstanding the provisions of this chapter, and in accordance with federal law, a victim of domestic violence who is seeking a domestic violence restraining order from a court, and who reasonably believes that a confidential communication made to him or her by the perpetrator may contain evidence germane to that restraining order, may record that communication for the exclusive purpose and use of providing that evidence to the court.(c) The Judicial Council shall amend its domestic violence prevention application and order forms to incorporate the provisions of this section.

Ca. Pen. Code § 633.6



Who is a Victim of Domestic Violence?

Is a previous finding of Domestic Violence required? i.e- Conviction for DV or previous DVRO?—SEE – BR.C v. BE.C. (2024) 101 Cal. App. 5th 259



How Far Back Can You Go to Record?

HYPOTHETICAL

At Mom's front door, dad says to 14 year old son:

“ Don't tell Mom I let you smoke marijuana at my house”

Mom has surreptitiously set up recording device that is tripped when someone comes to the front door,(Mom is intentionally recording)

Is this a confidential conversation?

HYPOTHETICAL II

- Parties have relationship for over 5 years.
- NOT MARRIED - a history of arguments over money, children etc.
- P1--- the individual with the money removes P-2 as a person who can charge on credit cards... ANDquestions fidelity of P-2.
- P-2 starts arguing with P-1 and then when P-1 starts to argue back- P-2 turns on phone recording.
- P-1 is unaware of recording.
- 5 months later – P-2 files for DVRO and wants tape admitted pursuant to PC 633.6.
- Does Judge bring up context?

Discovery Questions:

- 1) Should all recordings be requested?
- 2) 4th Amendment- is there an expectation of privacy?
- 3) 5th Amendment - self incrimination
- 4) Family Code 6309





HYPOTHETICAL III

Completely confidential communication between A and B - wrongfully recorded (under PC 631 and 632 it is a misdemeanor crime to have recorded; inadmissible) no DV exception at play. Now A is on the stand; “did B every say to you” A says “I have no recollection” - “is there anything that might refresh your recollection? Listen to this recording, and tell me yes/no does it refresh your recollection?” “yes”

**Can a party use an unlawful
recording to refresh recollection?
Impeach?**

CHILDREN'S TESTIMONY IN DVS

The Court of Appeal (First District, Division 1) has issued a new opinion addressing child testimony, in the context of a DVRO, and rights of confrontation.

The case is *Cardona v. Soto* (2024) 105 Cal.App.5th 141

Summary:

Karina Soto and Jose Cardona were parents of Daughter (age 12 at time of the incident).

Soto's October 2022 DVRO request alleged Cardona, while inebriated, violently beat his then wife in Daughter's presence. Daughter made an audio recording of the incident. After Daughter contacted another relative for help, Cardona slapped her face. Cardona was arrested and his wife was taken to an emergency room. Soto's DVRO request further alleged other incidents in which Cardona had abused Daughter.

At the DVRO hearing, the court spoke to Daughter in chambers, without a court reporter, and listened to Daughter's recording of the alleged beating incident, after which the judge returned to the courtroom, characterized the recording as "pretty awful," and issued a one-year DVRO protecting both Daughter and Soto. The court also granted Soto sole legal and physical custody, and denied Cardona visitation.

The appellate court reversed, finding the trial court violated Cardona's due process rights by partially basing its ruling on the interview of Daughter that was un-reported and not otherwise documented or summarized for the parties.



OBSERVATIONS AND TAKE-AWAYS

- Penal Code Section 633.6 allows a victim of domestic violence to record confidential communications, so long as he or she intends to request a DRVO and reasonably believes that the communication may contain evidence germane to that request, regardless of whether a DVRO request has been filed with the Court.
- Penal Code Section 633.6 should be viewed as a limited exception to Penal Code 632 and the inadmissibility evidence collected by eavesdropping pursuant to Family Code section 2022 as Penal Code Section 633.6(b) appears to state that the recording(s) are for the exclusive purpose and use of providing evidence to the Court in the DV proceeding.
- Simply because the evidence may be an exception to Family Code section 2022 and/or other evidentiary rules, do not forego your objections, at the very least to preserve your record. Also consider filing Motions In Limine prior to the hearing instead of (and possibly in addition to) just objecting at the hearing.

Questions?



Thank You



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