BEST PRACTICES FOR COUNSEL** IN THE SECTION 6309 ENVIRONMENT

(**applies to cases in which both sides are represented)

Michael Hanasab, Esq.
Jamra, Jamra & Hanasab, LLP

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

Hon. Lawrence Riff
Los Angeles Superior Court

Subpoena vs. Civil Discovery

Understand the difference between subpoenaing a witness to appear at the evidentiary hearing versus conducting civil discovery. Section 6309 applies only to the latter. If you seek, say, police body cam footage, you may serve a subpoena on the police agency to produce the video at the evidentiary hearing without first obtaining Court approval just as you could serve a subpoena on a third-party witness to appear.

If you plan to ask for a continuance of the hearing to permit, say, the police agency time to respond to the subpoena, you are not doing so under section 6309, again, because you are not seeking civil discovery.

difference between sending a business record subpoena to LAPD for body cam footage to obtain before the hearing vs subpoenaing at hearing (as sometimes we may want to have the records before the trial, review it, decide if and how to use it, etc.)

Good Cause

When you make your request for discovery at the evidentiary hearing, understand that the Court will be looking for "good cause" to permit it. Given the importance of a prompt disposition of DVPA proceedings and the risk that discovery can become a form of litigation abuse, expect the Court to require very good cause.

The working legal definition of "good cause" is "common sense based on the totality of the circumstances." This means the judge has vast discretion. You will cut little mustard by indignantly telling the judge that you are "entitled to know" or "Due Process requires", etc. Make a sound "good cause" argument tied to the facts of the case, not generalities about the potential adverse collateral effects that accompany DVROs.

Also, Respondent, if you have filed a your DV-120 Response to the DV-100 before the evidentiary hearing, do not argue that you are entitled "as of right" or "as a matter of course" to a first-requested continuance of the hearing.You are not. (N.M v. W.K, ---Cal.Rptr.3d---, 2024 WL 1191503.) Any such continuance is discretionary with the court. Basically, avoid the word "entitled"—and be thinking about "good cause," instead.

Meet and Confer

Meet and confer well in advance of the evidentiary hearing on matters of potential discovery. The Court will expect that you have done so.

Failing to do so can lead to unpredictable consequences for your client at the hearing: anything from no continuance and no discovery, on the one hand, to a prolonged continuance and full discovery, on the other. And the TRO, with its custody, property and other orders, may be summarily modified (or not) by the judge.

It's too risky, bilaterally, to roll the dice at the hearing with no advance communication among counsel. Tell your client that such a meet and confer is "a must"—because it is.

Respondent: Make an Informal Request

If you are Respondent, ask informally, but in writing, for Petitioner to share well in advance of the evidentiary hearing (1) the identity of any third-party witnesses and (2) for copies of any written evidence Petitioner plans to offer at the hearing. ("Informally" is emphasized because the more it looks like a discovery demand, the more problematic because, remember, serving discovery absent the Court's approval at the evidentiary hearing is forbidden.) Example:

> Counsel: Petitioner's DV-100 suggests that there are third-party witnesses Petitioner may call at the hearing and documentary evidence, such as emails, text messages, OFW transcripts, financial documents and the like, which Petitioner may offer at the hearing. At the hearing set for ____, I intend to ask the Court, under section 6309, for a continuance of the hearing and pre-hearing discovery to obtain such information so that my client may prepare a defense.
> It seems likely that the Court will permit some or all of that requested discovery and a continuance of some duration. To avoid that delay, I am asking that you provide the identity of any such witnesses and copies of any such documentary evidence immediately. If I receive such information at least 10 days before the hearing, I will not ask for formal discovery nor seek any delay in the progress of the hearing. Of course, I will advise the Court of this informal request."

Produce Information Promptly

If you are the Petitioner and you receive a communication of the type next above, produce the information promptly.

It may feel wrong and unwise to give one's opponent an advanced look at your evidence—which may indeed permit a more effective defense—but get over it. Civil discovery was designed to eliminate trial by ambush; section 6309 is civil discovery; QED, section 6309 was designed to eliminate trial by ambush. Moreover, if your client's goal is to get a long-term restraining order and to reduce the uncertainty surrounding, say, parenting time under the TRO, delay is not your friend.

On the other hand, you are under no obligation to produce impeachment or "true" rebuttal evidence, informally or in any later-permitted formal civil discovery. Impeachment evidence is the last vestige of trial by ambush, but it is tolerated because it enhances the truth-finding function of trial. A witness knowing that a truth-bomb might drop on them out of the blue are less likely to lie.

A word of caution (slight digression) about rebuttal evidence: "True" rebuttal evidence responds to something unexpected adduced in the Respondent's case. In theory, you can't produce your rebuttal evidence pretrial because you don't know what unexpected evidence will come in the Respondent's case. It is not evidence that could and should have been offered in Petitioner's case in chief but counsel held back to make a forensic big splash at the end of the case. Judges are far more open to true rebuttal evidence than case-in-chief evidence, masquerading as rebuttal evidence, held back for big-splash forensic effect. (For more on the key distinction between impeachment and rebuttal, see my Six Random Things that are Good to Know Including the Distinction Between Impeachment and Rebuttal Evidence, California Lawyers Association, Family Law News, No. 43-3, Sept. 2021.)

Petitioner: Make an Informal Request

If you are the Petitioner, ask informally (see parenthetical above) but in writing, for Respondent to share well in advance of the hearing (1) the identity of any witnesses and (2) for copies of any written evidence Respondent plans to offer at the hearing. But consider the consequences of such a request which may be delay in getting to the evidentiary hearing and a revision of the TRO in the meantime.But if you believe you should ask, here is an example:

> "Counsel: [Respondent's DV-120 disputes] [or] [Respondent has not yet filed a DV-120 but we assume that Respondent disputes] the material assertions in the Petitioner's DV-100. Accordingly, I anticipate that there are third-party witnesses Respondent may call at the hearing and documentary evidence, such as emails, text messages, OFW transcripts, financial documents and the like, which Respondent may offer at the hearing. At the hearing set for ____, I intend to ask the Court, under section 6309, for a continuance of the hearing and pre-hearing discovery to obtain such information to avoid the necessity of my client's putting on a rebuttal case.
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> It seems likely that the Court will permit some or all of that requested discovery which will inevitably result in a delay in concluding the evidentiary hearing. To avoid that delay, I am asking that you provide the identity of any such witnesses and copies of any such documentary evidence immediately. If I receive such information at least 10 days before the hearing, I will not ask for formal discovery nor seek any delay in the progress of the hearing. Of course, I will advise the Court of this informal request."

Respondent: Considerations in Your Response

If you are the Respondent and you receive a communication of the type next above, think carefully. You might decide simply to produce the information promptly, thereby eliminating the risk of a delay in concluding the evidentiary hearing—and your client having to experience more time under the TRO. But, again, civil discovery does not require disclosure of impeachment and (true) rebuttal evidence.

Consider this response:

> "Counsel: I hereby disclose to you that Respondent intends to call witnesses A, B and C at the hearing and to offer the attached exhibits. However, Respondent declines to identify those witnesses and exhibits which Respondent may offer to impeach Petitioner's expected untrue testimony. As I'm sure you know, parties are not required to disclose impeachment and true rebuttal evidence in discovery."

Be a Strict Minimalist

Above all else, be a strict minimalist in terms of any section 6309 discovery request. Sure, you might want a deposition but be prepared to answer the question why four well-drafted interrogatories (to be answered and verified within, say, five days) won't do instead.

If you are after documents, don't use the "all documents that relate to...." formulation. Be profoundly specific. And use your common sense. For example, if your client has access to the same repository of documents (OFW, bank statements), don't ask for their production from the other side.

Most judges are likely to have a conservative attitude about discovery in DVPA matters because most judges have been of the view, before section 6309 was enacted, that discovery as a matter of right was not permitted in DVPA proceedings. Judges will be aware of the risk of litigation abuse especially considering the legislative findings set out in section 6309. The more modest the request, the more likely your discovery request will be honored.

Beware the "Cross-Over" Case Situation

The trickiest problem for the parties and the Court will be the "cross-over" case situation where (1) there is a pre-existing pending parentage or dissolution case, (2) then a DVPA petition is filed, and (3A) discovery in the family law case is served while the DVPA matter is pending OR (3B) discovery in the DVPA proceeding is served while the family law matter is pending.

Do not use DVPA discovery to try to obtain information you seek for the underlying family law. Or vice versa. If you must serve discovery in the underlying family law case while the DVPA matter is pending, advise your opponent in writing that that is your intention and, for that reason, the discovery is not subject to section 6309. The other side may not be convinced of your bona fides unless you also make the promise that you will not use the discovery in the DVPA proceeding (and consider adding the proviso "except for impeachment" if necessary.)

If you end up litigating discovery in the cross-over case scenario, understand that judges likely will adopt some version of a "dominant purpose" test to determine if the discovery is really directed to the DVPA matter or to the family law matter. The fact that the family law discovery may have some potential utility in the DVPA case is not likely to persuade the Court that the family law discovery may not proceed. On the other hand, discovery plainly directed to abusive behavior, while the DVPA matter is pending, should be controlled by section 6309 procedure even though such evidence is relevant to, say, section 4230 spousal support issues.

Count on the fact that judges will likely be able to discern the actual dominant purpose of the discovery. They weren't born yesterday.

You Can Ask the Court to Postpone

If you are the Respondent and the judge has turned down your request to postpone the hearing to permit discovery, ask the judge to keep an open mind until after the Petitioner has presented all their evidence.

Once all concerned have heard the corpus of the Petitioner's evidence, the Court may be open to a short suspension of the hearing to permit Respondent to engage in very tailored, very focused, non-abusive discovery (e.g., there will be no reason at that time to ask for Petitioner's deposition.) Recall, section 6309 specifically identifies suspending the hearing in mid-course to permit discovery as a judicial option.

But be aware that a good and thorough cross-examination of the Petitioner's witnesses in Petitioner's case in chief may reveal to the court that further discovery is unnecessary. Respondent, be prepared to explain why you need the (very) tailored discovery in order to complete your cross-examination(s). Do not excuse Petitioner's witnesses at the evidentiary hearing but, instead, keep them subject to recall until you know what the court will or will not permit.

Be Specific and Tailored in Your Requests

If you are the Petitioner and you need time and discovery following presentation of Respondent's case to offer rebuttal evidence, make your modest request at that time. Be prepared to tell the judge what discovery (type and of whom) you intend to do, and the shortest period of time you need to do it. Again, this is a species of suspending the hearing in mid-course to permit good cause discovery.

Just as described above, be prepared to explain why you need the (very) tailored discovery in order to put on your rebuttal case, and if appropriate, don't excuse the Respondent's witnesses you may wish to recall in your rebuttal case but, instead, keep them subject to recall.

Be Prepared and Reasonable

If you intend to make a request for discovery under section 6309 at the hearing, be prepared to discuss modifications to the TRO. Make reasonable concessions—and do so quickly. (This is where the meet and confer in advance is so critical.)

If dad has not seen the kids for more than three weeks, Petitioner should promptly offer up some safe option that will permit contact (e.g., monitored visitation, Zoom calls.) If Respondent needs to get into the house to retrieve belongings, Petitioner should be flexible on arrangements.

Respondent, understand that the TRO, even if modified, will remain in place until the evidentiary hearing. You have a chance to show the Court that you are a responsible person and parent. ("Your honor, my client vehemently denies that any TRO or DVRO is appropriate but will accede to the Court's modifying the TRO in the short run.")

All of this will require some serious client counseling prior to the hearing. The Court will not have time nor inclination to hold a detailed hearing into modifying the TRO. If you are seeking the discovery (and hence the continuance), give the Court an easy route to follow.