

WITHOUT MY CONSENT

DIGITAL ABUSE RESTRAINING ORDER CHEAT SHEET

DOMESTIC VIOLENCE PREVENTION ACT (CALIFORNIA FAMILY CODE §§ 6200 ET SEQ.)

<p>Purpose</p>	<p>To prevent the recurrence of acts of domestic violence and to provide for a separation of those involved in order to resolve its underlying causes. (FC § 6220.) “The requisite abuse need not be actual infliction of physical injury or assault.” <i>Conness v. Satram</i>, 122 Cal. App. 4th 197, 202 (Cal. App. 1st Dist. 2004). This is in keeping with the notion that “domestic violence” is not limited to physical injury, but also includes the concepts of psychological and emotional abuse. <i>Pugliese v. Superior Court</i>, 146 Cal. App. 4th 1444, 1452 (Cal. App. 2d Dist. 2007).</p>	
<p>Proof</p>	<p>TRO: Reasonable proof of past act(s) of abuse (FC § 6300)</p>	<p>Order After Hearing: Preponderance of evidence</p>
<p>Defining Abuse §§ 6203, 6320</p>	<ul style="list-style-type: none"> • Intentionally or recklessly cause/attempt to cause bodily injury, or; • Sexual assault, or; • Place person in reasonable apprehension of imminent serious bodily injury to that person or another, or; • FC § 6320(a) behavior that has been or could be enjoined: molest, attack, strike, stalk,¹ threaten, sexually assault, batter, credibly impersonate another person,² falsely personate,³ harass, telephone (including but not limited to annoying telephone calls),⁴ destroy personal property, contact directly/indirectly by mail or otherwise, come within specified distance, disturb peace⁵ 	
<p>Nonconsensual porn (“NCP”) is “abuse” as that word is defined by FC § 6203</p>	<ul style="list-style-type: none"> • The disclosure, or threat of disclosure, of nonconsensual porn (“NCP”) constitutes “disturbing the peace” abuse under the DVPA, which is § 6320 behavior that can be enjoined by TRO and OAH restraining orders. See Endnote A. The court may also issue other orders as necessary to effectuate the court’s orders under Section 6320 or 6321. (FC § 6322.) 	
<p>TRO & Hearing Date</p>	<ul style="list-style-type: none"> • Same-day relief is available to NCP victims. (FC § 6326) (A DVPA protective order “shall be issued or denied on the same day that the application is submitted to the court. . . .”) • A hearing date must be set so long as the petitioner’s declaration is not jurisdictionally defective and the facts alleged constitute “abuse” as that word is defined by FC § 6203. FC §§ 6203, 6300-01; <i>Nakamura v. Parker</i>, 156 Cal. App. 4th 327 (Cal. App. 1st Dist. 2007). NCP constitutes “abuse.” See Endnote A. 	
<p>Orders</p>	<p>Ex Parte TRO</p> <ul style="list-style-type: none"> • Personal conduct (§ 6320(a)) – An order enjoining a party from behavior listed in § 6320(a) • No contact; stay away (§ 6320(a)) • Pets; care, stay away, personal conduct towards animal (§ 6320(b)) • Residence exclusion • Other restraints necessary to effectuate court’s orders (§ 6322) • Prohibit getting address (§ 6322.7) • Firearms/ammunition (§ 6389) • Temporary custody & visitation (§§ 6323, 6346) • Temporary property use/possession, debt payment (§ 6324) • Prohibit insurance charges (§ 6325.5) • Parentage by stipulation (§ 6323(b)(2)) 	<p>Order After Hearing</p> <ul style="list-style-type: none"> • Personal conduct (§ 6320(a)) – Personal conduct orders as set forth in FC § 6320 et seq. that otherwise may be issued on an ex parte basis (§ 6340(a)) • Residence exclusion (§ 6340(b)) • Child support (§ 6341(a)) • Spousal support (§ 6341(c)) • Restitution: for petitioner for loss of earnings & out-of-pocket costs, including medical care & temp housing (§ 6342(a)(1)); to respondent for out-of-pocket costs as result of ex parte order found to be insufficient at hearing (§ 6342(a)(2)); by respondent to agency for cost of services to petitioner (§ 6342(a)(3)) • Batterer’s intervention program • Attorney’s fees & costs (§ 6344)

<p>Sample Language for “Other Orders” Against the Restrained Party</p>	<ul style="list-style-type: none"> • California’s check-the-box Personal Conduct Orders (Judicial Council forms DV-110, DV-130, CH-110, CH-130) cover NCP. One incident of NCP is sufficient to trigger a DVPA restraining order. See End-note A. A NCP incident after the DVPA order is served would be a violation of a restraining order. • In addition, FC § 6322 authorizes the court to issue other orders that are “necessary to effectuate” the underlying restraining orders. WMC encourages judges to take advantage of this catchall provision to write in “other orders” tailored to the circumstances. We encourage petitioners to contact the Family Violence Appellate Project (http://fvapl.org) if orders are appealed so that FVAP can advocate at the appellate level to build a body of precedential case law. • One of the challenges of seeking relief in family court is the lack of clear standards for which “other orders” courts may issue consistent with privacy, abuse, and First Amendment law. Without My Consent’s forthcoming Other Orders chart is intended to be a step towards developing digital abuse orders that address the unique challenges presented by these cases, while still remaining consistent with established law. 	
<p>Sample Language for “Other Orders” that are Likely to be Accepted by Tech Companies</p>	<p>It is much easier to take down NCP content than it used to be. A growing number of tech companies will voluntarily take down NCP on their platforms, regardless of whether the victim owns the copyright or has a court order regarding the content. See http://www.withoutmyconsent.org/resources/take-down. It is still, however, a recommended best practice to include the URLs for the sites you want delisted, or the accounts you want closed, and to expressly ask the court to require the restrained person to remove the content. Including the URL in the order allows the technology company to verify that the content you’re referencing is the same content the court entered an order about.</p> <p>For example, in the “Other Orders” section of the DV-110 (TRO) and subsequent DV-130 (Order After Hearing), the judge would write in: “Remove website at [URL].”</p> <p>A restraining order does not name the technology company, but rather names the restrained person (assuming the order is based on user-generated content). Courts generally do not have the power to issue orders binding on non-parties; the companies would assert an independent First Amendment right to publish content; and the companies are immunized with regard to most content by CDA 230 (47 U.S.C. § 230). Because of these protections, WMC recommends that if the restrained party is not taking down content as ordered (or doesn’t have the technical ability to take the content down), that the companies hosting the content be approached gently, with an explanation that the court has ordered the content to be removed but that you’re having trouble getting that done and are requesting their assistance.</p>	
<p>Required Relationship</p>	<p>Per FC § 6211, domestic violence is abuse against:</p> <ul style="list-style-type: none"> • Spouse or former spouse, or • Cohabitant/former cohabitant FC § 6209, or • Current or former dating/engagement partner FC § 6210,⁶ or • Party with whom person has child(ren), or • Child or party of child subject to paternity action, or • Consanguinity or affinity to second degree (parents, grandparents, siblings, children) 	
<p>Violations</p>	<p>Restraining order violations: Give a copy of your restraining order to the local police, and keep a copy with you at all times. If there is a violation, call the police, file a police report, and report the violation to the court. The restrained party can be arrested, put in jail, and fined. Violation of a restraining order is a crime, and in California should always result in an arrest being made. PC § 166, 273.6; see DV-100 pgs 5-6 (citing PC §§ 836(c)(1), 13701(b)(9)).</p> <p>Additional crimes: The underlying offense of NCP is a crime in California, see, e.g., PC §§ 653(m) (harassment), 647(j)(4) (California’s revenge porn law).</p> <p>Civil: Victim may follow-up with a civil lawsuit for NCP. Allege a cause of action under Cal. Civ. Code § 1708.85, and use Judicial Council form MC-125 as the cover sheet. MC-125 provides Doe plaintiff status and a mechanism for redacting/sealing. Prevailing plaintiffs may request attorney’s fees. Relevant causes of action often include; privacy, confidentiality and emotional distress torts, civil NCP law, statutory harassment/stalking and/or violation of a restraining order.</p>	
<p>Duration</p>	<p>Ex Parte TRO</p> <ul style="list-style-type: none"> • 21 days, or 25 days if good cause (FC § 242) • Re-issuance: until the date of the hearing (FC § 245) 	<p>Order After Hearing</p> <ul style="list-style-type: none"> • Not more than 5 years for protective orders, firearms (FC § 6345(a)); If order is silent, 3 years

Sample language for the victim's description of abuse or harassment (DV-100 or CH-100):

I am a victim of nonconsensual porn digital abuse. The restrained party has distributed [or threatens to distribute] private, sexually explicit material of me without consent. [Insert specifics re: threats or actual distribution to friends, family, colleagues, the public, or attach a completed WMC evidence chart.] The impact on my emotional state has been devastating. [Describe the impact on your emotional state, relationships, education, and/or employment.] The restrained party is forcing my unwilling sexual exposure to the public as a way to hurt me. I need immediate help from the court in the form of an ex parte protective order to stop the abuse and prohibit the further dissemination of the nonconsensual porn. Given the viral spread of nude images on the internet, time is of the essence. Irreparable injury would result before the matter can be heard on notice.

Sample language to attach to your request for a restraining order if the Court seems unfamiliar with digital abuse:

Nonconsensual porn is harassment and "disturbing the peace" abuse under the Domestic Violence Prevention Act. See FC § 6203(4) ("abuse" includes any behavior that could be enjoined pursuant to FC § 6320). "Disturbing the peace," within the meaning of FC § 6320, means "conduct that destroys the mental or emotional calm of the other party." *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1497 (Cal. App. 6th Dist. 2009). There are many ways in which one can destroy the mental or emotional calm

of the other party. One way is through accessing, reading and publicly disclosing the person's confidential emails. See, e.g., *id.* Another way is by downloading and disclosing or threatening to disclose another person's text messages containing "intimate details of [the parties'] lives." *In re Marriage of Evilsizor & Sweeney*, 237 Cal. App. 4th 1416 (Cal. App. 1st Dist. 2015). Another way is through publicly disclosing the person's private images. See, e.g., *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (issuing a preliminary injunction prohibiting the publication, distribution or other dissemination of a sexually explicit videotape of entertainers Pamela Anderson and Bret Michaels on multiple grounds, including privacy). Nonconsensual porn is a crime in California (PC § 647(j)(4)). It is also "abuse" under the Domestic Violence Prevention Act when perpetrated by an ex-romantic partner. Here, there is ample evidence of past act(s) of abuse, as well as the clear implication that the Person I Want Protection From will continue to use the private information that he has obtained from Petitioner to continue to control, harass, and abuse Petitioner. I don't believe this will stop until the Person is enjoined.

Make the Sample Language Your Own:

It's critical that every statement you make in a court document be completely accurate and truthful. Double-check that any sample language you use applies to, and is a fair and accurate description of, your particular situation.

Notes

1. Stalk (Penal Code § 646.9)

- Willfully, maliciously & repeatedly follow or willfully & maliciously harass another person, and
- Make credible threat with intent to place person in reasonable fear for his/her safety or safety of immediate family.

2. Credibly impersonate (Penal Code § 528.5)

- Knowingly and without consent credibly impersonates another actual person through or on a website or by other electronic means for purpose of harming, intimidating, threatening, or defrauding another person.
- Credible if another person would reasonably believe, or did reasonably believe, that defendant was or is person who was impersonated.
- "Electronic means" includes opening email account or account or profile on social networking website in another person's name.

3. Falsely personate (Penal Code § 529)

- Falsely personate in private or official capacity and in that assumed character, also:
 - Becomes bail or surety for any other party, or
 - Verifies, publishes, acknowledges, or proves, in name of another, written instrument with w/ intent that it be recorded, delivered or used as true, or
 - Does any other act that subjects falsely personated party to be liable in suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or where benefit accrues to party personating.

4. Harassing by phone (Penal Code § 653m)

- With intent to annoy: telephones or makes contact by means of electronic communication device, & addresses to or about other person any obscene language or addresses to other person threat to inflict injury to person, property of person, or member of person's family, or;
- Makes repeated telephone calls or makes repeated contact by means of electronic communication device with intent to annoy other person at residence, whether or not conversation ensues from call or electronic contact. Does not apply to calls/contacts made in good faith.

5. Disturbing one's peace is abuse. "Disturbing the peace" within the meaning of § 6320, means "conduct that destroys the mental or emotional calm of the other party." *IRMO Nadkarni*, 173 Cal. App. 4th 1483, 1497 (Cal. App. 6th Dist. 2009) (email hack); *Evilsizor v. Sweeney*, 237 Cal. App. 4th 1416 (Cal. App. 1st Dist. 2015) (disseminating info from personal journal, ISP, social media); *Altafulla v. Ervin*, 238 Cal. App. 4th 571 (Cal. App. 4th Dist. 2015), 238 Cal.App.4th 571 (2015) (sharing personal info with family & employer); *Burquet v. Brumbaugh*, 223 Cal. App. 4th 1140 (Cal. App. 2d Dist. 2014) (unwanted emails, texts, showing up unannounced/uninvited).

6. Dating relationship (FC § 6210): Frequent, intimate association characterized by expectation of affection or sexual involvement independent of financial considerations. See *Oriola v. Thaler*, 84 Cal. App. 4th 397 (2000) (courtship).

Attribution

This digital abuse cheat sheet is based on materials created by the Hon. Shawna Schwarz, Superior Court Judge, Santa Clara County CA. In addition to her caseload, Judge Schwarz has created (and makes available upon request) numerous cheat sheets and flow charts used by judges statewide. WMC thanks Judge Schwarz for granting permission for this adaptation; the views expressed, and any errors, herein are those of WMC, and not Judge Schwarz.