

**Domestic Violence
Essentials**



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Stalking

1. Defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed Victim;
2. Defendant made a credible threat with the intent to place Victim in reasonable fear for her safety or the safety of her immediate family;
3. [A court order prohibiting Defendant from engaging in this conduct against the Victim was in effect at the time of the conduct.]

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Stalking

- ♦ Express threats of violence
- ♦ Implied threats of violence
- ♦ Course of conduct “threats of violence”

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Stalking – Express Threats

- ♦ *People v. McPheeters* (2013) 218 Cal.App.4th 124
 - The defendant had a history of domestic violence against the victim. He moved into the apartment building next door so that he could see her comings and goings. He began contacting the victim whenever she left the apartment. He told the victim that if she was not careful, something was going to happen to her. He bragged about beating people up and told her someone should beat her up, and the police could not keep him away from her. (*Id.* at pp. 135-136.)
 - Does not require intent to carry any threats

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Stalking – Express Threats

- ♦ *People v. Halgren* (1996) 52 Cal.App.4th 1223
 - The defendant called the victim repeatedly, insisting she talk to him. The victim told him she was not interested in doing so. The defendant told her she would be sorry for her rudeness to him, would pay for her rudeness, and that he would “fix her” or “fix this.” He positioned himself outside her office building so that he could see people as they left the building. (*Id.* at p. 1223.)

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Stalking – Implied Threats

- ♦ *People v. Falck* 52 Cal.App.4th 287
 - The defendant was a schizophrenic who required antipsychotic medication. He became fixated with a 19-year-old waitress at a restaurant he frequented. He sent her a dozen black roses, and then began sending her two or three letters a day, writing about astrology and how they were meant to be together for eternity. He was ordered to stay out of the restaurant, and arrested when he returned. He was put on probation and almost stayed away from the victim for 12 years, making two unsuccessful attempts to reach her by phone during this time. (*Id.* 291.)
 - At the end of this 12-year point, the defendant stopped taking his medication, and began to call the victim at her home. After her husband told him a police report had been filed and the victim changed her phone number, the defendant sent her letters that included pictures of the victim and pictures of himself, pornographic pictures from magazines that he indicated represented the victim, astrological references, discussions of sexual acts he wished to experience with her, and his intention to marry her. He gave her a list of his lifetime accomplishments, including that he was very good with an M-16 automatic rifle. (*Id.* 291-292.)
 - The Court of Appeal in *Falck* opined the defendant’s references to being together in eternity and his proficiency with a rifle could be construed as an intention to kill the victim and commit suicide so they could be together for eternity. The gift of black roses added sinister overtones, and the defendant “made it abundantly clear that his desires took precedence over the victim’s wishes” as his obsession continued over 12 years despite the victim’s efforts to ensure he would not contact her. (*Id.* 298.)

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Stalking – Implied Threats

- *People v. Falck* 52 Cal.App.4th 287
 - **Threat** – when determining whether a “threat” has occurred for purposes of the statute, the entire factual context, including surrounding events, and reaction of listeners (*Id.* 298)
 - Does not require intent to carry any threats
 - Sufficient evidence where defendant’s letters show obsessive desires
 - **Intent to put victim in fear** – sufficient evidence where defendant insisted on maintaining contact with victim although she was clearly trying to avoid defendant and although defendant had been warned away by police, the court and victim’s husband
 - **Intent** – can be inferred from circumstantial evidence, intent element is rarely susceptible of direct proof and must usually be inferred from circumstantial evidence

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Stalking – Implied Threats

- *People v. Itehua* 227 Cal.App.4th 356
 - **Implied threat** – an implied credible threat can be inferred from a pattern of stalking conduct. Defendant continued to call her, text her, contact her and her husband

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Stalking – Course of Conduct

- *People v. Uecker* 172 Cal.App.4th 583
 - The victim came out to her car at lunchtime one day, and the defendant was seated on his bicycle close to her car. They made casual conversation. Almost every work day for the next seven months, the defendant waited near the victim’s car when she came out for lunch, even when her work hours varied. She tried not to respond to his efforts to engage in conversation. He began leaving notes on her car, giving his phone number and asking if she would go out with him. The victim parked in a different location, but the defendant found her and asked if she was trying to get away from him. She started parking a significant distance away from the office building, and had people walk her to car. The victim had become so fearful that she stopped going out in the evenings and told someone in management that the defendant was “watching her every move.” The defendant was finally arrested when a manager saw him parked in his truck at lunchtime, positioned with a good view of the employee entrance to the parking lot. (*Id.* 586-588.)

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Stalking – Course of Conduct

- *People v. Uecker* 172 Cal.App.4th 583
 - **Willfully, maliciously and repeatedly followed** – sufficient after woman firmly told defendant she was not interested in him, he got mad and left a derogatory note on her car, and positioned his car with a good view of the employee entrance that woman used
 - **Implied threat** – sufficient finding where defendant made it clear he would do whatever it took to get her to go out with him
 - **Intent to put victim in fear** – sufficient finding where defendant left notes explicitly alerting woman that defendant had been tracking her. Also defendant called several times and had a hostile, demanding tone in one of his messages. (*Id.* 597)
 - **Harassed** – engaging in 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

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Stalking – Course of Conduct

- *People v. Lopez* (2015) 240 Cal.App.4th 436
 - A credible threat can be based on unwanted conduct that is so obsessive, relentless and disturbing that the victim is threatened and reasonably put in fear for her safety.
 - Relied on the previously stated case law

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Stalking – Making a record

- Serial PC 273.6 offenders – put on the record at sentencing or serving the CPO that the victim finds the behavior threatening or disturbing
- Tell officers to tell the defendant, if there are frequent calls for service/ arrests
- Consider cool calls
- Ask officers to call on a recorded line
- Consider a tracker warrant for the defendant's car

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Stalking – Jurisdiction

- PC 781 – when a public offense is committed in part in one jurisdictional territory and in part in another jurisdictional territory, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction for the offense is in any competent court within either jurisdictional territory.
- PC 784.7(b) - If more than one violation of Section 273a, 273.5, or 646.9 occurs in more than one jurisdictional territory, and the defendant and the victim are the same for all of the offenses, the jurisdiction of any of those offenses and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred.

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Stalking – Jurisdiction

- Get a letter from the DA's office from the other county and send a letter to them
- Upload both letters in VCIJIS
- Get approval from someone if you're giving up our jurisdiction
- Typical only if defendant has a record or open cases in the other county, law enforcement from the other county wrote the report or if the victim reported in a different county

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Stalking – Miscellaneous tips

- Is not a strike – neither serious nor violent
- Can request PC 290 registration, if there is a sexual component/ fixation
- 10 year CPO for victim and their immediate family
- Prison sentence can lead to a MDO evaluation per PC 2684
- Priorable:
 - PC 646.9(c)(1) – felony PC 273.5, 273.6 or 422
 - PC 646.9(c)(2) – felony PC 646.9
 - Changes the triad to 2-3-5
 - (c)(1) still wobbles
 - (c)(2) does not wobble
 - Must prove up at prelim

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Child Abuse

- ♦ Most common: PC 273a(b), PC 273a(a) and PC 273d(a)
- ♦ Probation is 48 months unless IOJ and must be stated on the record by the judge for 273a

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Child Abuse

Evidence Code 1360

- The victim is a minor, under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:
 - (1) The statement is not otherwise admissible by statute or court rule.
 - (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.
 - (3) The child either:
 - (A) Testifies at the proceedings.
 - (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.
- (b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.
- (c) For purposes of this section, "child abuse" means an act proscribed by Section 273a, 273d of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and "child neglect" means any of the acts described in Section 11165.2 of the Penal Code.

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Child Abuse

Evidence Code 1360

- MDIC, Body camera, Audio recording, Statements to officers
- Attach a copy of the transcript to motions
- Child must be competent but not necessarily "available"
- Be prepared to argue reliability → motive to fabricate, consistency, timing of the interview
- Give notice!
- "Strategery"

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- "Strategy"

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Child Abuse

- Qualifying a child witness – typically 10 and younger
 - How old are you?
 - What is your birthday?
 - What city do you live in?
 - Who do you live with?
 - Do you go to school? What grade are you in? Favorite subject?
 - If I ask you ask a question and you don't know the answer or I confuse you, I want you to tell me okay?
 - If I ask you what is my dog's name, what would you say?
 - Do you know the difference between the truth and a lie?
 - Which is better telling the truth or a lie?
 - (Stick with primary colors and make sure they know their colors)
 - If I tell you that I'm wearing a white shirt, is that the truth or a lie?
 - Do you promise to only tell us the truth today?
 - Then go on with your case

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Child Abuse – miscellaneous tips

- ♦ Experts – heat exposure, baby injuries or overdose possibilities
- ♦ Trial prep
 - Courtroom walk-thru with a bailiff present
 - Sit in the chairs where the reporter sits and all other parties
 - Let them play with the microphone and get it out of their system
 - Build a rapport
 - If the child is young or the conduct is egregious go play with them somewhere offsite
 - Older kids give them a heads up regarding qualifying questions

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Child Abuse – miscellaneous tips

- Tell the child the defendant will be present
- If child is affected by the presence of the defendant ask for leave to question from the well
- PC 273d(a) is 1170(h) and the probation minimum is 36 months
- Priorable – PC 273d(b): Any person who is found guilty of violating subdivision (a) shall receive a four-year enhancement for a prior conviction of that offense provided that no additional term shall be imposed under this subdivision for any prison term or term imposed under the provisions of subdivision (h) of Section 1170 served prior to a period of 10 years in which the defendant remained free of both the commission of an offense that results in a felony conviction and prison custody or custody in a county jail under the provisions of subdivision (h) of Section 1170.

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Inflicting Corporal Injury – PC 273.5

1. Defendant willfully inflicted a physical injury on someone with whom he has, or previously had, a dating relationship
2. The injury inflicted by Defendant resulted in a traumatic condition

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Inflicting Corporal Injury – PC 273.5

- Priorable:
 - PC 273.5(f)(1) – Prior PC 273.5, 243(d), 243.4, 244, 244.5 or 245 misdemeanor or felony within 7 years
 - Changes the triad to 2-4-5
 - PC 273.5(f)(2) – Prior 243(e)(1) within 7 years
 - Triad does not change but puts the prior on the charging document
 - 15 day minimum if there is one prior
 - 60 day minimum if there are two or more priors
 - Special allegation is applicable to either misdemeanors or felonies
 - Must prove up at prelim

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Uncooperative Victims

- Victim refuses to answer questions – ask to be held in contempt per PC 166(a)(6) and CCP 1219
 - Judge cannot jail a DV victim for refusing to testify but can fine them or refer them for consultation with a DV counselor
- Victim can't remember – E.C. 1235 prior inconsistent statements
 - E.C. 770 must give them the chance to explain or deny the statements
 - *Ledesma* (2006) 39 Cal. 4th 641; *Green* (1971) 3 Cal. 3d 981
- Victim "pleads the Fifth" – offer immunity
 - Victim must accept if it's a felony but not for a misdemeanor

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Uncooperative Victims

- Victim claims to have lied before – E.C. 1235 prior inconsistent statement
 - *Brown* (1995) 35 Cal.App. 4th 1585
 - E.C. 770
 - "Under Evidence Code sections 1235 and 770 the prosecution was entitled to present the evidence of prior statements in one of two ways: by asking [Victim] about them and allowing her to explain them, or simply keeping her available for further testimony and bringing on other witnesses to describe her prior inconsistent statements. Although the defense would be permitted to ask [Victim] about the statements during cross-examination, that stratagem would not preclude the prosecution from presenting the testimony of other witnesses." (*Id.* at 1596)

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Uncooperative Victims

- Victim honestly can't remember – E.C. 1237 past recollection recorded; try refreshing recollection first
 - (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
 - (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
 - (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
 - (4) Is offered after the writing is authenticated as an accurate record of the statement.
 - (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

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Proving crimes without a victim

- Unavailable per E.C. 240:
 - Disqualified
 - Dead or physically/ mentally ill or infirm – expert testimony
 - Privilege
 - Absent and the court is unable to compel attendance through its process
 - Refusal to testify despite contempt

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Proving crimes without a victim

- Unavailable per E.C. 240:
 - Timeliness of the search
 - The importance of the witness's testimony
 - Whether leads were reasonably explored (*People v. Thomas* (2011) 51 Cal.4th 449, 500.)
 - Sustained and substantial good faith efforts
 - Burden is preponderance (*People v. Alcala* (1992) 4 Cal.4th 742, 813.)
- "Determination will not be overturned because the defendant can conceive of some further step or avenue left unexplored by the prosecution" (*People v. Diaz* (2002) 95 Cal.App.4th 695)

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Proving crimes without a victim

- E.C. 1291:
 - (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
 - (2) 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 has at the hearing.

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Proving crimes without a victim

- ♦ E.C. 1291:
 - Dismissal and refiling does not invalidate prior prelim testimony
 - Opportunity to cross is not the same as “actually cross examined” or “given full and fair opportunity to cross”

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Proving crimes without a victim

- ♦ If victim testified at the prelim and the defense was given the opportunity to cross exam the victim, if the victim later becomes unavailable you can choose to use their prelim testimony but you don't have to.
- ♦ You can use only E.C. 1370, you can use only E.C. 1291 or you can use both, use your judgment

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Proving crimes without a victim

- ♦ E.C. 1370:
 - (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
 - (2) The declarant is unavailable as a witness pursuant to Section 240.
 - (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
 - (4) The statement was made under circumstances that would indicate its trustworthiness.
 - (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

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Proving crimes without a victim

- E.C. 1370:
 - (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:
 - (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
 - (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
 - (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

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Proving crimes without a victim

- E.C. 1370:
 - Statements can be made to friends or family if recorded or written
 - Voicemails, texts, Facebook, email
 - Requires notice to the defense
 - Requires an exception to *Crawford*
 - Prior opportunity to cross examine
 - Forfeiture by wrongdoing
 - Not testimonial in nature i.e., statements to medical personnel

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Proving crimes without a victim

- Also consider E.C. 1240
 - (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.
- Remember:
 - Making ID – E.C. 1238 may not save you
 - If the witness is unavailable make sure you can establish the requisite relationship
 - Neighbors, family, certified wedding records/ marriage license, birth certificate of kids, past 911 calls, jail calls
 - Consider a PC 245(a)(4) or PC 242 or another charge that doesn't require the relationship

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Forfeiture by Wrongdoing

- E.C. 1390:
 - (a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
 - (b) (1) The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing.
 - (2) The hearsay evidence that is the subject of the foundational hearing is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have been met shall not be based solely on the uncontroverted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence.
 - (3) The foundational hearing shall be conducted outside the presence of the jury. However, if the hearing is conducted after a jury trial has begun, the judge presiding at the hearing may consider evidence already presented to the jury in deciding whether the elements of subdivision (a) have been met.
 - (4) In deciding whether or not to admit the statement, the judge may take into account whether it is trustworthy and reliable.

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Forfeiture by Wrongdoing

- Where a defendant engages in wrongdoing that was intended to, and did procure the unavailability of a witness, the right to confrontation is forfeited. (*Giles v. California* (2008) 554 U.S. 353)
- "One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation" (*Davis v. Washington* (2006) 547 U.S. 813, 833)
- Burden of proof is preponderance of evidence
- "The exception applies not only when the defendant intends to prevent a witness from testifying in court, but also when the defendant attempts to dissuade the witness from cooperating with law enforcement." (*Giles* at 377; *People v. Banos* (2009) 178 Cal.App.4th 483, 491)

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Forfeiture by Wrongdoing/ Victimless trials

- Consider an expert
- Avoid victimless stalking and criminal threats cases unless there is compelling evidence why
- If forfeiture is found, all evidence should come in, including 1109 evidence and all statements, recordings and impressions of the victim
- Know your judge!
- Forfeiture requires some evidence of dissuading or attempts
 - Jail calls, mail op, social media posts

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Miscellaneous tips

- E.C. 1109
 - Live witnesses
 - The People are permitted to use documentary evidence related to a defendant's prior convictions in proving a defendant's prior offenses. (*People v. Wesson* (2006) 138 Cal.App.4th 959.)
 - Must be DV related on its face
 - Penal Code 13700 – narrow definition
 - Family Code 6211 – includes dating, spouse, a child and anyone within 2nd degree of consanguinity
 - *People v. Ogle* (2010) 185 Cal.App.4th 1138 – includes criminal threats and stalking

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Miscellaneous DV tips

- Dismissal per 1387:
 - (a)(3) the termination of the action was the result of the failure to appear by the complaining witness, who had been personally subpoenaed in a prosecution arising under subdivision (e) of Section 243, 273.5, or 273.6. This paragraph shall apply only within six months of the original dismissal of the action, and may be invoked only once in each action.
 - (b) an order terminating an action pursuant to this chapter is not a bar to another prosecution for the same offense if it is a misdemeanor charging an offense based on an act of domestic violence, as defined in subdivisions (a) and (b) of Section 13700, and the termination of the action was the result of the failure to appear by the complaining witness, who had been personally subpoenaed.

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Miscellaneous DV tips

- Dismissal per 1387
 - Does not burn your dismissal refile for the felony unless you don't refile within 6 months
- Consider adding a PC 243(d) if there is GBI but it's not clear cut
- SDT cannot be used to prove the underlying conduct but the medical personnel can testify to it with a hearsay exception
 - SDTs can be used as an offer of proof in 402 hearings
 - E.C. 1240 – spontaneous statements
 - E.C. 1250 – then existing state of mind
 - E.C. 1251 – state of mind (unavailable only)

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