FIGHT YOUR DOMESTIC VIOLENCE CASE:

A GUIDE TO BEATING FALSE ACCUSATIONS OF DOMESTIC VIOLENCE IN CALIFORNIA

BY JOSHUA MULLIGAN

About the Author

Joshua Mulligan received his law degree from Cornell Law School in 2004. Josh has been working in criminal defense since his second year of law school.

Following law school, Josh spent nine years as a Public Defender. Josh has been in private practice since 2013 at the law firm of Wilkerson & Mulligan. His practice remains 100% criminal defense. Josh had handled hundreds of domestic violence cases, ranging from misdemeanors to homicide. Josh has also tried dozens of domestic violence cases to juries, often obtaining "not guilty" verdicts, lesser charges, or hung juries. Josh is a California State Bar Certified Criminal Law Specialist and has earned perfect client ratings on Google Local, Yelp, and Avvo.

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Domestic Violence Defense

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What are the consequences of a domestic violence conviction?

The consequences of domestic violence convictions can vary, but whether it is a misdemeanor or a felony, they have a profound impact on the accused. The consequences range from fines and probation to prison time and loss of child custody, job, or career. In some cases, it can lead to extended probation, a protective order and may lead to deportation of non-citizens.

The police want to speak with me. What should I do?

DO NOT SPEAK WITH POLICE! If the police contact you and wish to speak with you after a reported incident, DO NOT SPEAK TO THEM. If your wife or girlfriend called the police on you and now the police have contacted you to "get your side of the story" don't be fooled – you are the suspect in the case and the police want to talk to you to gather evidence to use against you for prosecution.

Police are trained in what is known as the "Reid Technique for Interrogations and Interviews" which allows significant leeway in how police conduct their interview with you. Most commonly, police will intentionally lie about the evidence against you before telling you they need your side of the story, for example, police may tell you that the incident was captured on video, or that a neighbor heard or witnessed the fight, or that a doctor examined the 'victim' and concluded that there were injuries caused by domestic violence.

Even if the police LIED to you to get incriminating statements, those statements may be used against you in court.

How can an attorney help me before I am arrested?

An attorney is the only person you can confidentially discuss your case with. Please do not share your story with others.

You may have significant evidence or information that could be provided to police or the prosecution which may result in the case NOT being filed. For example, the alleged victim may have a past history of violence, or you may have threatening text message from the victim, or perhaps the alleged victim admitted that she lied to another witness. An experienced attorney will understand how to investigate and present this information to the police or prosecutor.

An experienced attorney will also have a strong idea as to how much bail will cost and will be able to refer you to a reputable bail bondsman and coordinate with the bondsman to have you bailed out of jail as quickly as possible if you are arrested.

If I am arrested, can I post bail? How much will it cost?

YES! Before your arrest, it is strongly encouraged that you contact a bail bondsman to arrange for an account and payment to be made upon your arrest. For misdemeanors, bail is set starting at $5,000. For felony domestic violence, bail will be set at a minimum of $50,000. To post bail using a bail bondsman, you will usually have to pay the bondsman 10% of the bail. If you have a retained attorney, the bondsman will accept 8%.

If you cannot afford bail, your attorney can request that the judge reduce bail or release you on your "own recognizance" – that means release without posting bail (some people call this "OR"). At the bail hearings, which can take place during your arraignment (first court appearance), your attorney can argue for a reduction in bail as you do have a right to reasonable bail.

Will I have to stay in jail while waiting for my arraignment?

NO! After an arrest, you are taken to a county jail for processing; you can post bail and be released within the same day, typically after a few hours. Your arraignment is the first court appearance, and you may be held in jail for several days before you are arraigned.

What can an attorney do for me after I am arrested, but before my arraignment (first court date)?

Your attorney can do quite a bit after your arrest but before your arraignment. Most importantly, your attorney can conduct their own investigation into the accusation, retrieve records, witness statements, photographs, messages, and valuable information to put together a case file to send to the DA office before any formal charges are filed. This can influence the DA's decision when determining whether to drop the case or request that the police perform an additional Pre-Filing investigation stage.

What counts as self-defense in domestic violence cases?

A person can use force to defend him or herself if they have been either attacked or are about to be attacked. The individual reasonably believes that they, or another, are in imminent danger of being harmed and so had to exercise force in the given circumstances. The level of force used must be "reasonable" and proportional under the circumstances. In practice, reasonable force is usually the same kind of force. For example, it is unreasonable to shoot somebody who might slap you.

I have always been taught that under no circumstances can a man hit a woman. I only hit my wife because she was attacking me, and I had to defend myself. Is it legal for a man to hit a woman in self-defense?

A man can defend himself against a woman. Although most people assume that men are more likely to inflict domestic violence, according to at least one academic study based on detailed survey information from men and women, women are responsible for initiating up to 70% of domestic violence incidents. In practice, the stereotype of the violent man and battered woman will be forefront in the mind of prosecutors, judges, and juries. The defense attorney will have an easier time making a self-defense case with a female client. That doesn't mean we can't raise self-defense with a male client, but the burden will be greater, and we will need to pay close attention to every lead and gather every piece of evidence possible.

If my partner was injured in the fight, does that mean I will go to jail even though I was defending myself?

The police will try to determine who the "primary aggressor" was in the fight and make their arrest accordingly. In practice, if a woman has any injury, even a scratch, the man will be arrest and booked for domestic violence.

My partner has a history of violence; can I bring this up in my self-defense case?

YES! Presenting evidence of the alleged victim's history of violence can support a self-defense case. The evidence can be witness statements, past police reports, or other forms of documented history of violence. Even threatening text messages or social media posts can be used to show a character for violence. In cases where we have found significant evidence of past violence, prosecutors have either dismissed the case or offered significant charging reductions in plea bargains.

I was acting in self-defense against my partner; what kinds of evidence can I use to support my claim?

The courts broadly construe what counts as evidence in support of self-defense. In addition to the past history of violence discussed above, witnesses can be called to show the alleged victim has a reputation for violence.

Other evidence could come from looking at the context of the fight – who started the argument and what was the cause of the dispute. There may also be text message which discuss the argument.

If you suffered any kind of injury, it should be immediately photographed, even if it is only a scrape or redness. Any property damage supporting your side of the story should also be immediately photographed.

Who can testify as a witness in a self-defense case?

Witnesses to a self-defense case can include friends, family, former partners (ex-wife or ex-girlfriend), your children, work colleagues, and any other individual who can speak to your character, history, and any past instances of violence or assault.

How do judges decide what kind of criminal protective order to issue? Are there different types of orders?

"Criminal protective orders" are issued in criminal cases, while "restraining orders" are civil orders issued in family court. The type of criminal protective order issued will depend on the case's facts and supporting evidence. There are two types of protective orders a judge can issue.

- No contact order: When a "no contact" order is issued, a defendant is strictly forbidden from having either direct or indirect contact with the alleged victim. This means that the defendant can NOT ask another person to send messages to the alleged victim.
- No negative-contact order: A no negative-contact order will allow you to have peaceful contact with the alleged victim. This means no hitting, harassing, or stalking. Tread carefully if you are subject to a no negative-contact order – the DA will inform the 'victim' that she can get you locked up very easily with a phone to police with a report of any kind of bad behavior.

My children were present when the alleged domestic violence took place; will they be taken away from me?

If children are present when the domestic violence took place, then Child Protective Services (CPS) will be called and conduct their investigation into the allegation of domestic violence. Children are typically not removed from the home unless there is significant and ongoing domestic violence in the home.

If my children are witnesses, do they have to testify in the case?

It depends. If they are teenagers, then yes, they likely will be called to testify in the case. Children may be called as witnesses if they are "mentally competent" to testify. A child is mentally competent if he or she can effectively respond to questions and describe an event they witnessed. Furthermore, it is important to show that the child understands the difference between truth and fantasy. In practice, young children will rarely be able to testify, whereas most children over about 12 will be able to testify.

What should I do about any of my social media accounts, emails, pictures, and text messages relating to the accusation? Should I delete them all?

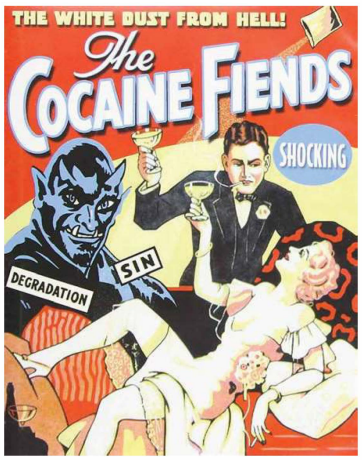
The first piece of advice is to set all social media accounts to private. Under no circumstances should you give your passwords or access to anyone else, not even those you deeply trust or have known your entire life. We don't recommend you delete or destroy text messages, images, profiles, or other social media information. This can give the impression of potential guilt or can be interpreted as an attempt to destroy evidence.

Second, you will also want to take screenshots and download any relevant social media information from any friend accounts or text messages before you are unfriended or unfollowed. You may also wish to delete or unfriend/unfollow any individuals who might serve as witnesses against you in the case.

Third, you should back up your data (text messages, photos, etc.) in case your phone is seized as evidence. Using a cloud service like Google Drive or Dropbox will allow for easy sharing with your attorney.

A witness or the alleged victim was doing drugs or drinking. Can this help my case?

YES! If a witness was impaired this will impact the quality and reliability of their memory. A witness who was heavily intoxicated, especially on illegal drugs, will not carry high credibility with the DA or judge. Furthermore, intoxication may be tied to increased aggressiveness or explosive anger. Always let your attorney know if anyone, 'victim' or witnesses, were under the influence during the incident. The evidence you provide can vary and might include such things as:



- Postings on social media about 'partying' or alcohol/drug-related events.
- Receipts from bars, restaurants, or liquor stores.
- Other witnesses present at the time that can speak to a drinking/drug use history.

- Prior convictions or complaints related to alcohol or drug offenses.
- Text messages or images relating to alcohol or drug use.

The alleged victim has a serious history of mental health problems. Can this be used in my defense case?

YES! A history of serious mental illness can be helpful for a defense case. For example, a common mental illness associated with domestic violence cases is bipolar with psychotic features. Evidence of this illness could help in presenting a case of an abrupt change of mood or behavior without forewarning. Individuals in such a state can behave erratically and make problematic accusations against others induced by a temporary psychosis state.

Collect any relevant evidence that supports a history of mental health problems. These could include statements from immediate family members (parents, children, cousins), medical professionals, and friends who can attest to the facts. You may also make a list of any prescribed medication for mental health issued and taken by the 'victim.'

My ex-partner is lying because they are trying to take the children, house, and everything else from me. Can I bring this up when defending myself against criminal charges?

It is ALWAY wrong to provide false statements to police or in a trial. Under California Penal Code section 148.5, it is a crime to knowingly make a false report of a misdemeanor or felony accusation to a police officer. Providing intentionally false testimony in a court case can lead to being charged with perjury.

If you believe your ex-partner is lying because they are trying to take everything from you, let your attorney know and provide them with any related records such as text messages, previous false accusations, witness statements, or any paper evidence supporting your claim.

If your partner has filed for divorce, child custody, or a restraining order in family court it is important to let your attorney know and provide your attorney with a copy of all the paperwork related to the family court case. Make a list of any prescribed medication for mental health issued and taken by the 'victim.'

What Should I do If I Receive a Restraining Order?

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What is the difference between a Civil Harassment Restraining Order and a Domestic Violence Restraining Order?

The California Code of Civil Procedure (CCP) defines 'harassment' as a course of conduct that involves "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct that . . . seriously alarms, annoys, or harasses the person." (CCP 527.6). This course of conduct can take many forms including, but not limited to, stalking, making harassing phone calls, sending messages through email or interoffice mail, and other similar behavior. The parties need not be related or have any prior relation for a Civil Harassment Order to be filed.

Domestic Violence Restraining Orders apply in cases where there is an incident or claim of abuse, threat of abuse, stalking, or sexual assault. There must be reasonable proof of a past act or acts of abuse. The parties must have a current or former relationship such as spousal, cohabitants, dated, have a child together or by second degree relation (e.g., in-law). California Family Code 6320 provides a longer list of actions that fall under the category of abuse or acts of abuse.

In practice, judges generally grant a vast majority of Domestic Violence Restraining orders while Civil Harassment Restraining Orders are often denied by judges following the hearing.

What are the consequences if I violate a Restraining Order?

Penalties for violating a restraining order can lead to some harsh consequences in California, including criminal charges.

In cases of violating a Civil Harassment Restraining Order, you can be charged under Section 166 of the California Penal Code as a misdemeanor, which is punishable for up to one year in jail and a fine of up to $1,000.

In cases of violating a Domestic Violence Restraining Order, California Penal Code 273.6 also imposes potential penalties of no more than one year in jail and/or a fine of no more than $1000. A conviction of PC 273.6 can result in deportation for non-citizens.

I was just served a Restraining Order, what should I do?

If you have been served with a Restraining Order, read it carefully as violating the terms of the order can lead to fines or possible jail time. You will also need to appear in court on the specified date. You must receive the restraining order 5 (or more) days prior to the hearing. If you are served with fewer than 5 days then you may request an extension in order to have a fair opportunity to prepare for the hearing.

For more information on the steps to take to respond to a filed restraining order against you, be sure to download and fill in the forms at the California Courts website.

Does the Restraining Order apply outside of California?

Yes! The restraining order remains valid and applicable across all states.

What is the difference between a Temporary Restraining Order and a Full Restraining Order?

A Temporary Restraining Order (TRO) may be granted pending a hearing. A hearing is required to be scheduled no more than 21 days from the filing of the order. The courts may, in some circumstances, extend it to 25 days with good cause. At the hearing, the judge will determine if the order should be extended on not.

A Full Restraining Order (FRO) cannot be granted until after the hearing by a judge.

I was never properly served the paperwork. Do I still have to worry about the Restraining Order?

Upon being served a Temporary Restraining Order and the set hearing, you should directly address the issue rather than attempt to avoid it. If you fail to attend the hearing because you believe you were not properly served, the other party will likely attend and claim that you were served properly. In such cases, you will lose the hearing by default and could potentially have a restraining order placed on you can last up to 5 years.

In the event you require more time due to improper or late service (less than 5 days prior to hearing), you can request additional time to prepare for the hearing.

If you never got the actual paperwork but you found out about the restraining order, you can find the forms to respond on the Riverside County Superior Court Website.

I filed a Restraining Order but have since changed my mind, can I just cancel it?

No! Once you a file a restraining order it cannot just be cancelled. This can only be done by a judge.

Don't I have the First Amendment right to say what I want to people?

Yes, but there can be limitations on the first amendment. The right to free speech does not allow you to repeatedly call people hundreds of times a day, or threaten violence or engage in harassing conduct. On the other hand, nasty, tasteless, or mean postings and expressions generally will not warrant a restraining order (unless conducing in a harassing way toward another).

Does getting a Restraining Order mean that I might go to jail?

No. Receiving of a Restraining Order does entail any immediate jail or prison time. However, violation of the terms of the restraining order (e.g., being in possession of a firearm or contacting the protected person) will lead to arrest, jail, and prosecution.

My hearing is scheduled soon and I'm worried I won't be ready for court. Can I ask for more time?

Yes! Court will grant a continuance to allow you more time to prepare for the hearing. Note: If you have already been awarded a continuance once, you may not get another.

Do I lose my Second Amendment right to own a firearm if I have a restraining order against me?

Yes. Although it might seem ridiculous that after this summary court process and short hearing you lose your right to own a gun, it is the law in California. These cases have been litigated extensively by dedicated 2nd Amendment advocates but the firearm prohibitionists have prevailed. You may think this law is crazy and want to stand up for your rights and thumb your nose at the nanny-state nuts who take your constitutional rights, but please don't – you will end up in jail.

Under California Penal Code section 30305, it is a FELONY to own or possess a firearm if you have an active restraining order. Under California Penal Code section 29800 , it is a FELONY to have ammunition if there is an active restraining order.

What will happen if I don't get rid of my guns after the hearing?

Family Code section 6389 ('Firearm Restriction') makes it "unlawful for a person subject to a temporary restraining order to own, possess, purchase, or receive any firearms during the protective order." The California Department of Justice will

conduct a firearm search through the Automated Firearms System (AFS) or through agents working for their 'Armed and Prohibited' program. In the event that you have an active restraining order and a registered firearm, then they will visit your home to inquire about the firearm. If you do not cooperate, they can get a search warrant for your home. Being in possession of a firearm while having an active restraining order is a FELONY (California Penal Code sectio 29825). The same applies to being found in possession of any ammunition.

What if I gave away or sold a firearm that was registered to me, but myself and the buyer did not do the paperwork to transfer the gun?

In the event that you gave away or sold a firearm registered to you but did not complete the needed paperwork to transfer gun ownership, you will need to rectify this as soon as possible. You can do this by going to a licensed gun dealer with the buyer and completing the necessary paperwork.

Aside from having to stay away from a person, are there other consequences to the Restraining Order that I should know about?

Restraining orders can lead to more than just ordering you to stay away or not communicate with certain individuals. As discussed above, you lose your right to own or possess a firearm after a restraining order is issued.

Domestic violence restraining orders can result in you being forced to leave your family home, loss of custody or contact with children if they are part of the order, and even monetary support may be included in the order. A restraining order can be EXTREMELY costly.

In cases of a Domestic Violence Restraining Order, you will be required to complete a one-year (52 week) anger management courses or fulfill other similar services.

Finally, restraining orders are public record and will appear on some background checks which can have significant consequences to personal reputation and employment.

The children are listed on the order, but I would never harm them. What can I do?

Losing your children can be one of the most terrible aspects of this process. The fact of the matter is that the judge makes the Temporary Restraining Order decision based on a one-sided story, usually described in a few short paragraphs. If the children were present to witness domestic violence this will be enough to issue the temporary order.

At the hearing on the permanent order, you will be allowed to present your side of the story. The judge may be hesitant to issue an order that keeps you from your children if they were not actually threatened or placed in danger.

I have witnesses! How do I present my witnesses in the case?

The most important kind of witnesses are people who may have been present when the attack supposedly occurred – they may help you show that the petitioner is lying or that any violence was only in self-defense. You may also produce witnesses showing the petitioner's violent character (for example, she attacked you or others in the past). You may also find witnesses to show that she is lying. Whatever witnesses you use, don't be petty – the judge will hold it against you if you waste time or talk about irrelevant things. For example, I've seen multiple cases where the responded argued that the hitting was justified because the petitioner had cheated – this does not impress the judge.

You will have an opportunity to provide a summary of the witnesses' testimony on the response paperwork that should be provided to you when you are served with the temporary order.

Next, make sure the witnesses attend court to testify before the judge to help evidence your case.

My wife and I work in the same building, how I can avoid violating my Restraining Order?

A judge will determine at the hearing the terms and conditions of the order. In most cases, an order can be issued that allows necessary interaction between the individuals such as providing care for the children or fulfilling work related obligations.

My wife is calling me and coming over to my apartment. Am I violating the restraining order by talking to her or visiting with her?

If the restraining order is no longer needed or wanted, you really should go through the courts. Technically it may not be a violation if she initiates contact and comes to your place, but a police officer may not be interested in that 'technicality' if she calls the cops on you to report that visit – just because you would beat the case doesn't mean you won't be arrested and spend a couple days in jail.

Furthermore, after she initiates contact a few times you will be tempted to call her and visit her. Each phone call or visit that you initiate is a violation. Please don't do it. Go through the court to get the restraining order dismissed before you continue with your relationship.

What can a "Victim" in a Domestic Violence Case do to Help get the Charges Dropped?

What can a "Victim" in a Domestic Violence Case do to Help get the Charges Dropped?

What are the penalties for a domestic violence conviction in California?

Being charged or convicted of domestic violence can have serious consequences, including jail and prison time. Aside from potential fines, jail, and probation time, conviction can lead to restraining orders (criminal protective orders), loss of custody rights, and loss of a job or career. In cases of non-citizens, they may be deported from the United States.

When my partner goes to court, will the judge issue a "no contact" restraining order?

When a person makes their first court appearance on a domestic violence case, the judge must consider issuing a criminal protective order (which most people call a "restraining order"). In most cases, the judge will follow the alleged victim's wishes. However, the judge can order "no contact" even when the alleged victim wants to continue the relationship. If a "victim" wants a "no negative contact" order they should tell that to the defense attorney and prosecutor and plan to attend court in case the judge has additional questions. Sometimes it helps to prepare a written statement to read in court if the judge intends to issue an unwanted "no contact" order.

I lied to the police. How can I fix this?

I do not recommend contacting the police or DA to give a new statement as it will not be easy to set the record straight.

If you seek to correct the record directly with police or the DA, they may ignore you, distort your new statement, or even intimidate you by hinting that you could be prosecuted or that CPS may take your children if you refuse to cooperate.

Police and prosecutors typically don't believe false accusations are common. I have heard many police, prosecutors, and judges make twisted jokes about recanting victims. So be ready – when you recant, the authorities won't believe you and it won't get your husband or boyfriend out of jail, at least not immediately.

However, if your partner has an attorney, you should approach the attorney and

explain how and why the police report is wrong. The attorney should immediately document the new statement. This may be done in writing, recorded, or you may give the new statement to a private investigator who will produce a written report.

If your partner cannot afford to hire an attorney, it is best to wait until the case is in court and a public defender is appointed.

Do I have any rights as the "victim" in the case?

Yes. California has a Victim's Bill of Rights, also known as Marsy's law, which afford a number of rights and protections to alleged victims of domestic violence. In practice, Marsy's law gives you some of the following rights:

- To speak to the prosecutor and judge to request lower bail or release on own recognizance (release from jail without bail)
- To speak to the judge and prosecutor before a decision is made regarding a criminal protective order (restraining order)
- To speak with the judge and prosecutor about sentencing or punishment

Does the lawyer representing my partner represent me too?

No. Your partner's lawyer represents them and not your interest. In other words, your partner's attorney has an obligation to them only and none to you. It will certainly be important to meet with your partner's attorney and provide any new statements, evidence, or list of witnesses to your partner's attorney if you are seeking to help get the case dropped or reduced.

However, you should know that your partner's attorney has important and significant limitations in speaking with you. For example, your partner's attorney cannot advise you regarding requirements of legal service of a subpoena or help you consider if you should risk contempt of court for failure to testify.

Can I hire my own attorney to represent me in court and to talk to the prosecutor and judge?

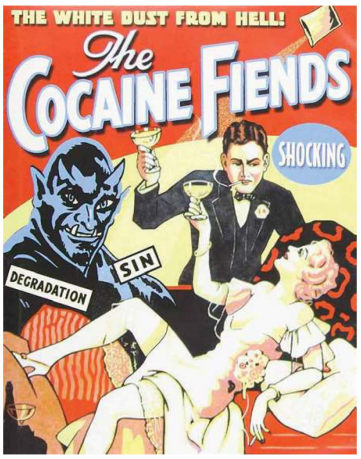
YES! It is strongly advised that you consult with an attorney and seek their services to represent you in court and talk to the prosecutor and judge on your behalf. Having an attorney will require the prosecutor's office to direct all communication and requests through your attorney's office and they can act as a buffer between you and them.

Furthermore, your own attorney can advise on issue like immunity, contempt, and the (very improbable) risk of being charged for lying to police or starting the fight.

I was using alcohol or drugs when I made the police report. I know that I do not accurately remember what happened and my statement to police was not correct. How do I fix this?

Let either your attorney or your partner's attorney know that you were under the influence. Try to think of ways to document the fact of drinking or drug use. For example:

- Receipts from a bar
- Prior convictions from alcohol or drug related offenses
- History of attending rehab or outpatient drug / alcohol treatment
- Other witnesses who are aware of your drug or drinking habits
- Past social media posts "partying"



I lied in my police report and I want to correct it, but someone has told me it won't matter because of other witnesses or medical records. What should I do?

It ALWAYS matters if you lie and someone is facing jail or prison time because of it. Don't let someone discourage you from coming forward with the truth. Also, it is likely that the person telling you that it won't help doesn't know what they are talking about. Only the defendant and defense attorney have access to all the "discovery" material (police reports, video interview, bodycam, etc.) and the defense attorney will be best positioned to determine if the new statements help the case.

I have been served a subpoena. Do I have to attend court?

YES. If you have been served a subpoena, then you must appear in court at the specified date and time. If you fail to appear after proper service a judge can put you in jail.

Be careful playing games with avoiding subpoena service. If you don't answer the door at your home, DA investigators may return repeatedly and will eventually seek to serve you at work, which can be embarrassing.

Also, be careful about nitpicking whether the service was good. If you have a copy of a subpoena in hand, it is best to go to court. I've seen prosecutors ask for warrants on improper service several times in the past (for example, investigator leaves the subpoena on the doorstep or in a mailbox.) If you end up in jail on a warrant based on improper service, the judge will make you promise to appear at the next court date and release you – normally this happens after you spend two or three days in jail!

Will the case be dismissed if I refuse to testify?

Maybe. The 6th Amendment in the Bill of Rights provides that a defendant has the right to "confront" the witnesses providing evidence against him. In general, this means that hearsay statements cannot be used unless the witness is testifying. In practice, this means that in most domestic violence cases, the prosecution will be left with little to nothing to present if the alleged victim is not testifying.

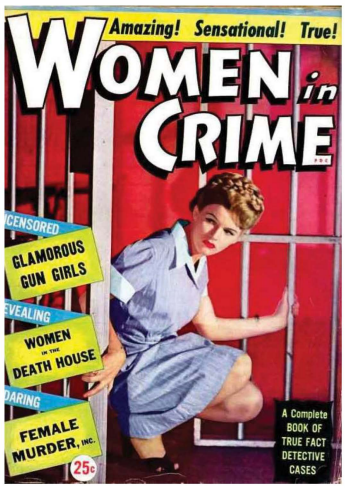
There are several exceptions, most commonly a 911 call may be admissible as an "excited utterance" if the call was made during the altercation. Sorting out what evidence might be left if an alleged victim refuses to testify is best left to an attorney.

Can I be forced to testify against my spouse?

Yes, a spouse can be forced to testify in a domestic violence case. Even though in most types of cases, "spousal privilege" will allow a wife to refuse to testify against her husband, this does not apply in domestic violence cases (Evidence Code 972).

However, in California a court has extremely limited contempt power to punish an uncooperative victim in a domestic violence case. California Code of Civil Procedure section 1219 provides that if a domestic violence "victim" refuses to testify, the worst that the court can do is require the witness to "consult" with a domestic violence counselor.

Can I go to jail if I refuse to testify against my partner?



NO! A judge cannot jail an alleged domestic violence victim for refusing to testify. This is a protection provided only to alleged victims in domestic violence and sex cases pursuant to California Code of Civil Procedure 1219.

IMPORTANT CAVEAT – failure to testify must be distinguished from failure to come to court after being served a subpoena. If you fail to appear after proper service, you may end up in jail.

What has the best chance of getting the case dismissed: refusing to testify or testifying about how and why I exaggerated the story and lied to the police?

There is no easy answer.

If the prosecutor does not have enough evidence to present the case without the alleged victim's testimony, the entire matter will be dismissed. However, if the prosecutor has other evidence to outline the case, a jury may still convict – and the jury may think the alleged victim has been intimidated or threatened.

If the alleged victim has a compelling story, it may be best to just come forward and tell the truth. For example, one common story I hear is that a woman catches her boyfriend cheating and starts the fight, then calls police and blames the boyfriend. Usually this can be compellingly supported by text message communications about the cheating, and sometimes there are threats of violence directed at the boyfriend.

Am I guilty of a crime if I lied to police to get my husband or boyfriend arrested?

Yes, technically. Giving a false statement to a police officer is a misdemeanor under California Penal Code 148.5. However, I have never seen an alleged victim in ANY case prosecuted for attempting to set the record straight after giving a false statement (including situations where the recanting story seems like bullshit and isn't believed by the DA.)

If I make a statement or testify that I lied to police, will I get in trouble?

Yes, theoretically, you could get in trouble, but in practice I have NEVER seen this happen. Although there is a possible risk in coming forward to correct false statements made to police, you should weigh that against the VERY REAL probability that your partner will face jail time, onerous probation terms, and the possible loss of a job or even deportation.

If I make a statement or testify that I did something illegal – like start the fight or take illegal drugs – will I get in trouble?

Unlikely. Although technically possible, I have never seen this happen in practice. The prosecutor will not believe your recanting statement and there may not be very much independent evidence to back up the illegal activity. If there is a serious possibility of prosecution you should definitely "take the 5th" and refuse to answer questions.

Can I take the 5th and refuse to testify if I did something illegal that I would have to testify about?

YES! The 5th Amendment to the Bill of Rights provides that no person "shall be compelled . . . to be a witness against himself." In practice this means that whenever a witness might be called on to give testimony which might possibly incriminate that witness, the witness can "take the 5th" or "stand on the 5th" and refuse to answer questions.

If you are called to testify and you believe that something about the incident would call for you to give incriminating testimony (for example, illegal drug use, starting the fight, or making a false statement to police), then you should tell the judge "I refuse to answer on the grounds that I would incriminate myself" or simply, "I need to take the 5th." If you don't have your own attorney, the judge will appoint a public defender to discuss this situation.

After invoking the 5th, the DA will present you with an immunity agreement. You have different options depending on if the prosecution is for a misdemeanor or a felony:

- In a MISDEMEANOR prosecution, a witness CANNOT be forced to accept the immunity agreement. You may simply tell the prosecutor "no" and not sign the agreement. You can stand on the 5th and nobody can force the testimony (California Penal Code section 1324.1).
- In a FELONY case, a witness CAN be forced to accept the immunity agreement (California Penal Code section 1324). However, after the immunity agreement, if the witness refuses to answer questions, the court's power to hold the witness in contempt is still limited, as outlined above.

Will Child Protective Services (CPS) take my children if I refuse to cooperate with the prosecution?

CPS can take action if there is domestic violence in the home.

However, children should not be removed unless there is significant and ongoing domestic violence. Sometimes police or prosecutors will suggest that failure to cooperate with the prosecution will result in CPS taking your children. This is witness intimidation and it is illegal. If a prosecutor or police officer starts tell you that you need to cooperate to keep your children, you need to ask for specifics and then report the conversations to your partner's defense attorney.

What are the Consequences of a Domestic Violence Conviction?

What are the Consequences of a Domestic Violence Conviction?

Can I go to jail or prison for domestic violence?

Yes. There are a number of ways domestic violence can lead to jail or prison.

After arrest, a domestic violence suspect will be held in county jail until posting bail. Riverside County jail system does have serious overcrowding issues and the jail has a limit on jail population that was established by a Federal Judge, which results in releases due to overcrowding. This is called a "Federal Release," but inmates and attorneys usually refer to this as a "fed kick." However, you should absolutely not wait for a fed kick on a domestic violence case. It is VERY RARE for the sheriff to fed kick anyone held for domestic violence charges.

Can I post bail if I am charged with domestic violence?

Yes.

Bail for MISDEMEANOR domestic violence charges range from $5,000 to $10,000 dollars.

Bail for FELONY domestic violence begins at $50,000 in Riverside County.

It is strongly recommended that you get an attorney and hire a bail bondsman. Inmates represented by an attorney will be able to post 8% of bail. Unrepresented inmates, on the other hand, must post 10% of bail with a bondsman.

What is the most jail or prison time I can get for a domestic violence case?

Although maximum sentences are almost never imposed, a misdemeanor violation of California Penal Code section 243(e)(1)(domestic battery without injury) can carry up to six months in county jail, and a misdemeanor violation of Penal Code section 273.5 (domestic battery with injury) can carry up to one year in county jail.

A felony violation of Penal Code section 273.5 can send you upstate for four years. More serious cases involving substantial injuries, deadly weapons or guns, or dangerous conduct like strangulation may result in longer sentences. You can be sent to state prison for life in a serious case, even if the victim did not die.

How much jail or prison time do most people get?

In my experience, the typical sentence for misdemeanor domestic violence cases is just house arrest - wearing of ankle bracelet but not jail time. Sentences range from about 10 days to 120 days. The actual sentence depends on your background and the facts of the case. Any prior criminal record weighs heavily against you. While on house arrest you can go to work, pick up your kids from school, and attend medical appointments.

In felony cases, actual jail time is not mandatory (many sentences can be served on house arrest), but the sentence will depend on the background of the defendant and the seriousness of the assault or injuries. First-time offenders facing only Penal Code section 273.5 charges will typically have house arrest. Repeat offenders may face state prison time, as will people with cases involving deadly weapons or serious injuries.

How long is probation?

Probation in domestic violence cases is three years. This is the minimum mandatory length of probation on such cases.

It should be noted that this is different from probation given in other types of criminal cases, which are set at two years for felony matters and one year for misdemeanors. (California Penal Code section 1203.097.)

What does probation involve?

Domestic violence convictions require the completion of a 52-week anger management course (batterer's program classes). The classes typically meet once a week for two hours.

Forty (40) hours of community service is also required.

In addition to the 52-week program and 40 hours of services, there are various fees and fines. These fees and fines can cost you anywhere from $500 to over $1,000 dollars, depending on the plea and charges.

You will also be required to pay restitution to the victim to cover such costs as medical treatment, counseling, or property damage. Finally, a criminal protective order must be issued. The judge may issue a "no negative contact" order which will allow you to continue to interact peaceably with you partner, but in more serious cases there will be a "no contact" order.

Does the criminal protective order mean that I can't talk to my wife / girlfriend?

Courts have several options when drawing up a criminal protective order, depending on the strength and facts of the individual case. There are three general protective orders that may be issued:

A. No Contact Order: This requires no direct or indirect contact with the victim.

B. Limited Contact Order: This is typically for children related matters and other necessary exchanges.

C. No Negative Contact Order: This requires refraining from any assault or threatening conduct (striking, hitting, harassing, stalking, etc.) toward the victim.

How much can I be ordered to pay in restitution?

Restitution is mandatory.

In practice, restitution is provided for property damage and medical treatment. Occasionally, a victim will seek mental health treatment and ask for payments to cover counseling or treatment.

On some occasions, the victim may submit a claim for expenses related to lost work hours or employment. Moving expenses may also be claimed in some circumstances. If the circumstances of the case resulted in a personal injury lawsuit (in addition to the criminal case), then there can be an order to pay the victim's attorney fee in the civil case as well.

Restitution orders can add up to six figures (or more) in some cases. The probationer will be required to make payments depending on their ability to pay during probation. After probation is complete, the California Tax Franchise Board takes responsibility to collect any remaining portion of the restitution. If the remaining amount is not paid, then the Tax Franchise Board can take collection action and seize tax returns until restitution is fully paid.

What should I expect from the 52-week class?

For any domestic violence conviction, you will be required to complete a 52-week anger management class (once per week for two hours). If children were present during the incident, you may be required to also complete 52 weeks of parenting classes.

Courses will require both attendance and participation. Instructors make periodic notes and periodic scorecards of participation. Failure to attend can lead to jail time.

Instructors are required to rate your performance and will grade your 'recidivism risk' (risk of reoffending). Instructors scoring can be used in sentencing at a probation violation hearing. It is important you attend class and you should take the class seriously and participate.

What happens if I miss some classes?

A program may allow a very limited number of excused absences. If an individual fails to attend the classes, then the program will send a notice to the court and seek prosecution regarding the attendance failure. The prosecution will file a petition noting the violation of probation leading the judge to issue an arrest warrant.

At the court hearing on the probation violation, the judge can assign jail time for the failure to attend classes.

Are there any alternatives to the anger management class?

No. Anger management classes are mandatory.

Do I need to hire an attorney or can I just plead guilty to the charges and be done with it?

Maybe.

For MISDEMEANOR domestic violence charges, you may plead guilty without an attorney. However, the consequence of pleading guilty includes potential jail time, a criminal record, fees, career repercussions (e.g., losing professional license), and, in some cases, deportation. The judge and prosecutor will not know anything about your background or how a guilty plea may impact your life. Many people who do not hire an attorney end up thoroughly regretting that decision. Consulting with an attorney is usually free and an experienced attorney will be able to sort out what your collateral consequences are fairly quickly.

In FELONY cases, most judges will not accept a plea from an unrepresented defendant. If you do not retain an attorney, a public defender will be assigned your case. While there is a right to represent yourself in a felony case, this is almost always a bad idea and the judge will strongly discourage you from going forward without an attorney.

What are some of the other repercussions to a domestic violence charge?

Aside from potential jail or prison time, there are several other major repercussions to a domestic violence charge. Attorneys often call these impacts "collateral consequences." For most people, the collateral impacts are worse than the direct consequences of jail and probation.

These include, but are not limited to, loss of employment, loss of child visitation privileges, deportation, and loss of professional licenses.

Will the charges show up on my background check?

Yes. In California, domestic violence charges will appear on all employment-related background checks for seven years. It will also show up in housing rental application background checks for seven years.

Other states have different disclosure rules – your California conviction may stick with you for life if you live in another state, even if disclosure of that conviction would be illegal in California.

In the event that a case has been dismissed in accordance with California Penal Code section 1203.4 (expungement), then the domestic violence charges will not appear on most background checks. You can file for expungement only after all fees and fines are paid and you have completed your probation. For a more detailed explanation, see the Expungement FAQ on my website.

I have a professional license, will I lose it if I am charged with domestic violence?

Possibly. Any conviction or pending case should be disclosed to the appropriate licensing agency. Depending on the facts of the case, a loss of a license can occur, as well as various other onerous probationary terms as established and set by the licensing board or institution. These are in addition to any court probation terms. For example, a medical board might require the completion of additional ethics courses or other evaluations prior to reinstating a license. These will vary based on different boards and policy requirements.

Am I allowed to keep my guns if I am charged with domestic violence?

No. At arraignment (the first court appearance) the judge will issue a Criminal Protective Order. Even if the order only specifies "no negative contact," any person with a pending Criminal Protective Order is prohibited from owning or possessing a firearm. Both California and Federal law prohibit individuals with domestic violence records from owning or possessing any guns or ammunition. This is true even for misdemeanor convictions.

Under California Penal Code section 29825, it is a felony to own or possess a firearm if you have domestic violence charges.

Under California Penal Code section 3030, it is a felony to have ammunition if you have domestic violence charges. Expungement cannot restore firearm rights after a domestic violence conviction.

What will happen to my immigration status if I am charged with domestic violence?

If you are not a U.S. citizen, a domestic violence conviction may result in deportation

and permanent exclusion from the United States. This holds true even for permanent legal residents. If you are a non-citizen, you should start working with an attorney immediately.

Will having a domestic violence charge affect me in family court?

A history of domestic violence charges is taken very seriously in family court. Most importantly, you may face decreased time with your children, or even be limited to supervised visitation.

The judge may also use a history of domestic violence to increase the spousal support and child support award above guidelines.

FAQ: Expungement & Background Checks

FAQ: Expungement & Background Checks

How long does a conviction show up on a background check?

It really depends on the purpose of the background check:

Private employers – for most jobs, a background check will go back as far as 7 years. If your conviction is older than 7 years, you may not need an expungement to pass an employment related background check.

Professional licenses – a professional license is typically given by the state for various professions such as general contractor, physician, teacher, accountant, lawyer, or real estate agent. If you are applying for a professional license read the rules carefully. Usually you will need to disclose ALL prior convictions, even those which were expunged. It still is important to get an expungement if you are applying for a professional license as it helps to show rehabilitation to the agency reviewing the application.

Schools, hospitals, and similar workplaces – if you are going to work in a hospital or school, you will have a livescan background check. You will need to be cleared for work by the State of California. The person reviewing your background will see everything. It may help to have an expungement in order to pass this background check. Even though the reviewing agency will see all the convictions, in many circumstances a bureaucrat will have a discretionary choice whether to clear you for the job, and the expungement will be viewed favorably.

I have a past conviction and I want to clean up my record. What can I do?

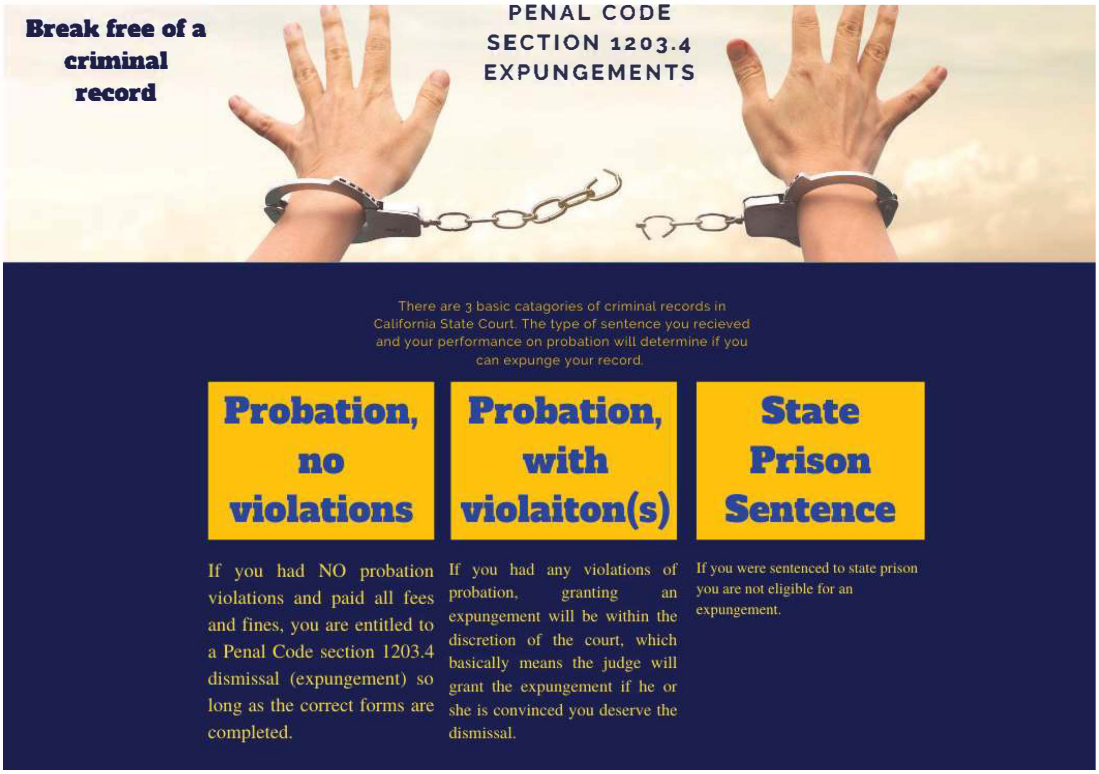
California Penal Code section 1203.4 provides that a convicted defendant who has completed probation may request that the court dismiss the charges. This will allow a person to pass most employment related background checks and it can be an essential step in moving forward a career hobbled by a spotty past.

How do I know if I am eligible for a Penal Code section 1203.4 dismissal (expungement)?

If you have:

1. Paid all fees and fines;
2. Completed probation; and
3. Not had any violations of probation

Then you are entitled to have your case dismissed under California Penal Code section 1203.4. Under these circumstances the judge must grant your motion to dismiss the case.



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Can I still petition for expungement if I had probation violations?

If you admitted a probation violation while you were on probation, then you may still get a dismissal under California Penal Code section 1203.4, but the motion is discretionary. Basically, this means that the judge will dismiss the case if he feels like you deserve it.

If you aren't sure whether you violated probation, a probation violation occurs whenever a person messes up something he or she was supposed to do for court. Most common violations are things like having to get reinstated into a DUI or domestic violence class, or getting a reinstatement into house arrest after blowing the enrollment date.

Can I petition for expungement if I had a split-sentence "mandatory supervision" sentence?

Yes. However, this is a discretionary call on the part of the judge and the judges are more hesitant to grant relief in mandatory supervision cases. It is worthwhile to apply, but important to make sure that the documents supporting the petition are thorough.

Is there any way to get probation terminated early so I can get the case expunged and pass a background check?

Yes. A judge has the authority to terminate probation early where there is a good reason for early termination. I have been able to get early terminations many times. However, there really must be a good reason. Some typical examples would be where the probationer needs the expungement to enter the military or where there is a job offer on the table, so long as the California Penal Code section 1203.4 is granted.

Can my felony charge be reduced to a misdemeanor?

Possibly! It depends on whether the charge was a "wobbler". A Penal Code section wobbles if it can be charged as either a misdemeanor or a felony. If the charge wobbles you can request that the court reduce the felony conviction to a misdemeanor after the fact. Penal Code section 17(b) provides that a judge may reduce certain felonies to misdemeanors after completion of probation.

One way to find this information is to review the statute you were convicted under – California Penal Code- and look for language like:

"shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

This wording indicates that the charge can be punished by prison or by county jail. This charge wobbles. However, if the punishment indicated is only "imprisonment in the state prison . . ." this charge is strictly a felony and cannot be reduced.

Do I need to hire an attorney to get my case expunged?

No. You can attempt to complete the expungement process on your own.

However, I would be careful about doing an expungement on your own if you have probation violations. A person who doesn't spend time in court or work on these with some frequency may not have a good idea of how to present a matter for a discretionary expungement. If you poorly present your case and the expungement is denied a judge is unlikely to reconsider the matter, at least not for some time.

Can expungement restore my 2nd Amendment right to own and use firearms?

You may be able to get gun rights restored. While the expungement cannot restore gun rights, if you were convicted of certain felonies, you may be able to get the charge reduced to a misdemeanor for all purposes (Penal Code section 17(b)). There are many charges which result in a loss of 2nd Amendment rights whether misdemeanor or felony. Most of the common charges where guns are permanently forbidden are assault charges or domestic violence (for example, Penal Code section 245, 273.5, 240, or 243). Drug or theft charges have the best chance for restoration rights. Consult with an attorney for details specific to your case.

Can I pass a background check for a job after an expungement?

CALIFORNIA LAW ONLY – IF YOU LIVE IN A DIFFERENT STATE OTHER RULES MAY APPLY: After an expungement is granted it is, for the most part, illegal for a background check company to disclose the conviction to a potential employer. Major exceptions apply - an expunged charge will still show if you are applying for a professional license, such as contractor, nurse, accountant, real estate, doctor, or lawyer. Expunged charges will also show if you are applying to work at a hospital or school.

If my expunged charge will still show when I am applying for my professional license, is it worthwhile to apply for an expungement?

Yes. The person reviewing your application will certainly see that the charge has been expunged. If you are attempting to show rehabilitation or good moral character an expungement will be essential.

Can I get a professional license after an expungement?

Yes. Don't give up on your dream! I have met several attorneys and medical professionals who have significant criminal records. The key will be to show that you are rehabilitated and now have appropriate moral character. An expungement will be an essential part of the process.

Will an expungement help me with immigration?

Maybe, but this is certainly not guaranteed. The Federal Government will still consider the charge a conviction, but as with many other areas, if the call is discretionary, typically it will help you to have the charges expunged.

END