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How to Assist Clients in Laying a Record for Appeal and Avoid the Unauthorized Practice of Law: A Training for DV Advocates and Non-Attorneys

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Who we are

- Nonprofit agency dedicated to appealing cases in California on behalf of survivors of domestic violence
- We:
 - ▣ Represent clients in appeals
 - ▣ File amicus (friend of the court) briefs in cases of statewide importance
 - ▣ Train attorneys and DV advocates on issues pertinent to appeals
 - ▣ Assist pro per litigants (people without attorneys)
 - ▣ Work with law students to become the next generation of advocates
 - ▣ Provide technical assistance to attorneys, advocates, and pro per litigants

What district are you in?



Overview

- This training is for non attorney advocates
- What is an appeal?
- Unauthorized practice of law
- Hypothetical situations
- Laying a record for appeal
- Referring cases to FVAP
- Questions

What is an appeal?

- An appeal is when someone who loses in a trial court asks a higher court (the court of appeal) to review the trial court's decision.
- In most cases, the court of appeal will look at the lower court's decision to determine if there was a legal mistake, and if that mistake changed the outcome ("judgment").
- Appeals do not allow you to present new evidence or witnesses, and the court of appeal may not reverse a decision simply because it disagrees with the outcome.

Why appeal?

- You don't have to accept the outcome of the hearing.
- An appeal may be one of the only ways to challenge and change an adverse outcome from trial court.
- If an appeal is successful, and the court of appeal's opinion is published, then the decision not only helps the individual client who won, but it also helps to guide the trial courts in the state to make better decisions in other similar cases, and apply the law better.

Unauthorized Practice of Law

All non-attorneys assisting domestic violence victims should be aware of the prohibition on unauthorized practice of law.

What is the unauthorized practice of law?*

California Business and Professions Code prohibits any person who is not a licensed attorney from:

- 1) Practicing law or
- 2) Holding him/herself out as someone who is entitled to practice law

*Adapted with permission from “Ethical Legal Advocacy: Issues for Domestic Violence Advocates” © 2012 by Erin Scott, Family Violence Law Center and Jessica Dayton, Communities Overcoming Relationship Abuse

What is “practicing law”?

- Providing legal advice - explaining the law **and applying it** to a client’s situation
- Completing court forms **based on interviewing the client**
- Providing opinions on a client’s legal issues
- Predicting the outcome of a case
- Representing the client in court
- Coaching a client on giving answers they believe to be legally advantageous

What is NOT practicing law?

- Providing legal information, for example: “There is a broad definition of abuse under the DVPA.”
- Providing court forms to a client
- Filling in forms ***at a client’s direction***
- Providing manuals or guides to a client on how to complete court documents, without personalized advice
- Providing emotional support to a client at a court hearing

Legal Information v. Legal Advice

- The existence of a law
 - ▣ Legal information (OK!)
- How some judges interpret the law
 - ▣ Legal advice (not OK!)
- Where to go to file, get help, find an attorney
 - ▣ Legal information (OK!)
- Advice on what to say at court
 - ▣ Legal advice (not ok!)

Hypotheticals

Unauthorized practice of law

Scenario #1: Crisis line

Advocate Alex: Crisis line. This is Alex. How can I help you?

Claire Caller: Hi. Um, I don't know but someone told me to call you about a restraining order. I think I need one.

Alex: Ok. I can give you some information about that. Victims of domestic violence can file paperwork with the family court asking for protection from the person who is abusing them. You can ask for the court to order that the person stay away from you and not contact you. You also can ask the court to protect your children, if you have any, and to give you custody, visitation and support orders.

Claire: Oh, I don't want to keep him away from the kids. He can see them whenever he wants!

Scenario #1: Advice or information?

Claire: Oh, I don't want to keep him away from the kids. He can see them whenever he wants!

Alex: I understand why you feel that way.

But that may not be a good idea.

The judge might think you don't really need a restraining order if you don't also ask for protection of your children.

You can ask for a temporary order that includes your children and then work out a visitation schedule later.

Scenario #1: Advice or Information?

Claire: Oh, ok. What about getting him counseling? I think he really needs it.

Alex: You can ask the court to order him to attend a 52-week batterer's treatment program. I've heard, though, that some of the judges won't order this. You may have more luck getting some sort of counseling order if you file a divorce or paternity case.

Claire: Who do I call?

Alex: Here are some referrals.

Scenario #2: Preparing for DVRO hearing

Alex: Hi Claire, did you bring all the documents you want the judge to look at for your hearing?

Claire: Here they are. Now what?

Alex: Who is going to talk about these documents?

Claire: Just me. Mostly they are text messages from my husband and some pictures. I'm not sure about this one, though. He texts me that he is sorry he hit me, and I replied he will be sorry because this time I am going to court.

Scenario #2: Advice or information?

Alex: Oh, yeah, I have heard that your judge really does not like women who come off as aggressive. Maybe you want to leave that out.

Claire: Ok. I still have the pictures of the bruises, so hopefully that will be enough evidence.

Alex: It should be.

But remember, this is your chance to show the judge the evidence that you have. Tell me what order you want to talk about these documents. Then, I will make copies for you and I can help you put them into binders and number them.

Claire: What are the binders for again?

Alex: The binders are just a nice way to present the documents. You are required to show any documents you want to put into evidence to the other side first. The binder is a way to give your husband all your documents once, at the start of the hearing, instead of one at a time while you go along. The judge can also follow along with his own binder.

Scenario #2: Preparing for hearing

- What if Alex works with an attorney who will represent Claire at trial, and the attorney has asked Alex to go through all of Claire's documents with Claire and pull out any that make Claire seem aggressive, because the attorney knows this judge and only wants to present evidence that does not put Claire in a light where she looks aggressive?
- Can Alex explain this to Claire? Can Alex work with Claire to weed through the documents on this basis?

[Yes – operating under instructions and supervision of attorney]

Scenario #3: Alex Advocate Helps Claire Client at a TRO Clinic

Claire: Here is the form they gave me at intake. Do you write on it, or do I?

Alex: I can write on it, but you have to tell me what to say. If you don't understand one of the items, I can help.

Alex: Number 3 asks if you want to protect any family or household members.

Claire: What should I say?

Alex: In addition to protecting you, a Restraining Order can protect your family members, or people who live in your household. Do you want the restraining order to protect anyone besides yourself?

Scenario #3: Advice or information?

Claire: Can the order protect my step-daughter Donna, I consider her my child, and I have court ordered visits with her, but she is the daughter of my ex-husband.

Alex: The form says to list any family members you want to protect. I can't tell you whether the judge will enter an order to protect her or not. There is a space on the form for you to explain why you think she needs to be protected, but that comes later.

Claire: Oh, so if I give a good enough reason, then the judge will include her?

Alex: It might be unlikely because the judges often don't include children on restraining orders.

But this application is your opportunity to tell the judge what protection you are asking for, and why you believe that a protective order is necessary.

Scenario #3: Advice or information?

Alex: Question 8 asks if you want the Judge to order your boyfriend to move out of the home.

Claire: He owned the home before we met. But I paid to have a new roof, and to have a new heater put in last winter. Does that mean I have a right to live there while he leaves? I'd like to stay if I can. In fact, when we first met it was because I was applying to rent a room there.

Alex: It doesn't sound like you have any ownership rights in the house. I have been told that if you do not have a right to stay in the home, you should not ask for it, it will just make the judge mad.

Claire: Ok, then I won't ask.

Laying a Record for Appeal

The “record” is all of the documents and transcripts that the court of appeal looks at when it evaluates what happened at trial.

Setting up appeals & future hearings

- An **appealable order** is necessary to make an appeal viable. (Ask FVAP for assistance on this.)
- A **good record on appeal** greatly increases the chances of success on appeal, and there are steps litigants can take to make a good record.
- Plus, even if a litigant wins at trial, having a good record can make future hearings easier. If either party is asking to change an order a good record will let the trial court know what happened at previous hearings and why.

What is a record on appeal?

- When a litigant appeals a court decision, they are responsible for creating a record on appeal, which means telling the appeals court what trial court **DOCUMENTS** and record of **ORAL PROCEEDINGS** to look at when deciding the appeal.
- Having **a complete record** greatly increases the chances of success on appeal, because the court of appeal needs adequate information to evaluate the trial court's decision.

What is a record on appeal?

□ Documents

- Evidence (text messages, pictures, reports, etc.) – Whether a document is properly entered into evidence matters, if an appeals court is going to take it into consideration.
- Moving papers (ex. TRO application and response)
- Pre-trial and post-trial motions and decisions, if there are any, may also form an important part of the record on appeal.

□ Oral Proceedings

- Testimony, including any objections and the judge's response to objections
- Oral proceedings often (but not always) come in the form of transcripts if available.

Why does it matter?

- When you appeal, you do not get a whole new trial.
- The burden is on you to show that – ***given what the trial judge was shown and told*** – s/he committed “reversible error.”
 - ▣ This means the judge did something wrong that could have affected the outcome of the trial. Usually, we have to show the judge interpreted the law incorrectly, applied the law incorrectly, or there was not substantial evidence in the record to support the outcome.
- So, if there is an insufficient or incomplete record for appeal, you may lose your appeal.

Creating an Oral Record

Court Reporters

- Contact the court and find out if there will be a court reporter at the hearing, or if the hearing is officially recorded.
- If not, your client needs to decide if s/he wants to pay for a court reporter and needs to arrange that with the court.
- Try to create relationships with court reporters who may be willing to work pro bono for your organization.

Creating an Oral Record (cont'd)

Court Reporters

- If a reporter is not affordable, there are ways to help the client to remember what happens at the hearing if s/he needs to write it down later for an appeal:
 - ▣ Call ahead and ask the judge's clerk if s/he can bring a tape recorder just to help her/him remember what is said
 - ▣ Ask a friend to take notes
- Cal. Rule of Court 1.150 allows the judge to permit individuals to use a device for sound recordings with advance permission, but it only can be used for personal notes.

Creating an Oral Record (cont'd)

Raise the issues

- Remind your client to raise all issues and objections on the record while they are in court.
- If an issue is not in the record, it can't be appealed.

Creating an Oral Record (cont'd)

Help a client outline her oral evidence:

- **Who** will testify?
 - ▣ Ask at the Self-Help Center about any need to put together a witness list, when it has to be served, and how it has to be served.
 - ▣ Refer to the Rules of Court or Local Rules for your county.

Creating an Oral Record (cont'd)

Help a client outline her oral evidence (cont'd):

- **Why** is this person's testimony important?
 - ▣ Help the client prepare a 1-2 sentence explanation of what the witness will testify about and why each witness is necessary to their case.
 - For example: My neighbor is going to testify that on 12/25 she heard arguing, and the sounds of something hitting the wall between our apartments hard, several times. She will talk about a written complaint she made about it on the 27th which I will ask be part of the evidence in this case.
 - ▣ If the judge does not want to let your witness testify, you can tell these 1-2 sentences to the judge to explain why it is important (called an "offer of proof").

Creating an Oral Record (cont'd)

Help a client outline her oral evidence (cont'd):

- **What** will you ask the witness? Write your questions ahead of time.
- Will you be asking the witness about any **documents**? Include that in your questions.

Creating a Documentary Record

- If your client wants the judge to consider any documents, including reports or pictures, during her trial, she needs to have them placed into evidence.
- How You Can Help:
 1. Evidence Binder
 2. Foundational Questions
 3. Practice Moving Documents into Evidence

Documentary Record (cont'd)

1. Help put together an **evidence binder**:

- ▣ 4 Copies. It is best to bring a copy for the judge, a copy for the opposing party, and a copy for any witnesses, plus your own copy.
- ▣ Number Exhibits. If possible, place them in a binder in the order they will be discussed and number them.

Documentary Record (cont'd)

- 2. Foundational Questions.** Help your client write down what she is going to testify about, or ask a witness about, for each document.
- Make a check-list of each document she wants the judge to see.
 - ▣ Who will talk about what this document is?
 - ▣ What does this document show?
 - ▣ For some documents, the time and place of the document might be at issue. For example, if the document is a picture, ask the witness (or if the client is the witness, she can just discuss it herself) the time and place that the picture was taken, as well as who took the picture.

Documentary Record (cont'd)

3. Moving Documents (Exhibits) into Evidence.

- After someone testifies about a document, the person offering the document as evidence needs to ask the Judge to admit it into evidence.
 - Practice saying it!
- If the Judge says no, ask for an explanation why.
- Use your check-list: check-off each document moved into evidence.
 - If anything is not checked-off, ask to put it into evidence before the hearing ends.

Reasons for the Court's Decision

- It can be very important to an appeal for the court of appeal to have reasons for the court's decision.
- In some cases, the court is required to provide its reasons for the decision. For example, if the court denies a restraining order.
- In other cases, the court does not have to provide its reasons. However, there are other ways to obtain them.

Reasons for the Court's Decision

- One way to get the reasons is to ask the court for a “Statement of Decision.”
 - ▣ What is it? A statement explaining the factual and legal basis for a court's decision of each principal issue raised at trial.
 - For example, did the judge find there was an act, or acts, of domestic abuse and what was the basis for that finding? Did the judge order joint custody, and if so, why?
 - ▣ Why? A written order is best. If there is no court reporter, then the Statement of Decision will have to be made in writing.

Reasons for the Court's Decision

- If the matter is finished within one day or less than 8 hours (like many DV matters), the Statements of Decision must be requested **before** the judge takes the case “under submission.”
- “Under submission” means all the parties have presented all their evidence, and the judge is ready to make the decision.
- Help your client remember to ask for a Statement of Decision at the right time or prepare a written request for a Statement of Decision and give it to the judge at the beginning (the Self-Help Center can help).

Other ways to help

- Call and remind witnesses.
- Help with transportation or directions.
- Arrange any necessary interpreters.
- Suggest client observe other DVRO hearings. Find out when and where they take place.

How FVAP Can Help You

- Connect the client with Family Violence Appellate Project as soon as you can!
 - Email: info@fvapl.org; phone: (510) 858-7358
- We can help with:
 - Assessing cases for appeal
 - Legal research
 - Creating tip sheets, toolkits, and other materials
 - Answering questions about setting up a case at trial
 - Suggest other possible trial motions for a case

Referring Cases to FVAP

FVAP's Case Criteria

1. The client is a survivor of domestic violence
2. The case originated in California Family, Civil, or Probate Court (e.g., dissolution, post-judgment, custody, parentage, Domestic Violence Prevention Act, civil harassment, immigration, and guardianship matters), or in California state or federal court under the Hague Convention on the Civil Aspects of International Child Abduction
3. There is a final order from the trial court

FVAP's Case Criteria (cont.)



- Not sure if your case fits?

Call us!

Help Your Client Access FVAP's Services

- Help the client gather her/his paperwork:
 - ▣ Order, Statement of Decision, or Minute Order
 - ▣ “Moving Papers”
 - Example: Application, and Response, for Restraining Order
 - Example: Request for Order, Motion to Modify Custody and Responses
 - ▣ Documentary Evidence that was submitted at hearing
 - ▣ Transcripts, if available, or information on how to order them



Questions?

Thank You!

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- Thank you again for watching. This webinar is now concluded.