

an OSC constitutes a notice of motion, the trial court could exercise its discretion by excluding oral testimony and denying Darshana's application "based on the insufficiency of the application" [citing *In re Marriage of Hunt* (1985) 172 Cal. App. 3d 872, 875, 218 Cal. Rptr. 451; *but see* *Ross v. Figueroa* (2006) 139 Cal. App. 4th 856, 865, 43 Cal. Rptr. 3d 289 (nothing in Fam. Code suggests that DVPA respondent may not challenge issuance of permanent restraining order through oral testimony)].

However, the appellate court cautioned the trial court that, in exercising its discretion to exclude or allow oral testimony, the trial court should be guided by the constitutional principle that "[d]ue process guarantees 'notice and opportunity for hearing appropriate to the nature of the case'" [quoting from *In re Jesusa V.* (2004) 32 Cal. 4th 588, 601, 10 Cal. Rptr. 3d 205, 85 P.3d 2]. In addition, the appellate court noted that Darshana's application for a restraining order under the DVPA was entitled to calendar preference, under Fam. Code § 244.

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#### Commentary

**Hon. Richard E. Denner, Judge (Ret.)**

This case is remarkable. A domestic violence restraining order is permitted where there is no showing of violence but only that one party's private email account was accessed. In effect, now the restrained person is not able to possess firearms, has a more difficult task in a request to claim custody of the children, may be denied spousal support, and suffers the detriment of a restraining order. If accessing a private email account is domestic violence, would the court act similarly if a private desk or office was searched for evidence of financial transactions that could embarrass or cause the other spouse fear from business competitors? Somehow the rule of law has been warped beyond all recognition. It will be interesting to see if other breaches of confidential spaces are treated similarly.

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#### Commentary

**Barbara A. DiFranza**

Thank you, Mrs. Nadkarni, for getting us this published appeal rather than choosing to travel to civil court to file an old-fashioned, but very expensive,

injunction. Warning our divorce clients to change passwords on all accounts—financial and email—should be standard operating procedure. When our client tells us about a spouse's strange ability to predict her/his schedule or obtain knowledge of activities, our warnings should be stepped up.

In the old days, we simply suggested that our client check for phone taps. Now there are new and creative ways to intrude on one's spouse. Googling the phrase "electronic spying on spouse" will provide over 19,000 hits, among them a variety of software to allow one to "automatically—and remotely—record everything they do on the PC & Internet." GPS-tracking devices for autos appear to be readily available to satisfy that nasty urge to know where one's former spouse travels at any time of the day or night. As might be expected, there is software available which is advertised to detect and counter some of this infiltration. If those countermeasures are insufficient to keep the client from experiencing the eerie and detrimental effects of invasion of privacy, the client should call in an expert to determine and document any cyberspying behavior.

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#### Commentary

**Stacy D. Phillips and Jacqueline Shaprow**

*In re Marriage of Nadkarni* makes it crystal clear that the Domestic Violence Prevention Act (DVPA) was intended to go beyond recognizing purely physical forms of abuse. In *Nadkarni*, the Court demonstrated that the DVPA was in fact intended to be a means of recognizing and addressing nonphysical and perhaps more subtle aspects of abuse. Therefore, when practitioners are meeting with their clients, it is essential for them to think about the ways in which these more subtle aspects of abuse have manifested themselves in certain relationships.

Although the DVPA does not require that physical violence has transpired, in reality most practitioners have generally focused on physical abuse and/or threats of physical abuse as being necessary to succeed in obtaining a restraining order under the DVPA. The statute has always explained that "disturbing the peace" constitutes abuse within the meaning of the DVPA; however, most practitioners have never seriously entertained the idea that nonphysical acts (beyond threats of physical acts)

would also be covered by the DVPA. Therefore, this case alerts practitioners to the necessity of looking beyond purely physical abuse.

*Nadkarni* provides an easy to follow, step by step analysis that practitioners can use to advise their clients when deciding whether or not the specific fact pattern presented rises to a level sufficient for a showing of abuse under the DVPA. Additionally, *Nadkarni* helps family law practitioners predict future trends in the law—what types of nonphysical acts will be labeled as “abuse” since there are several types of nonviolent conduct that may constitute abuse within the meaning of the DVPA.

However, I question whether a court would reach a different result if there were no prior abuse in a marital relationship. In this case, the husband beat his wife in front of their children and was subsequently convicted of misdemeanor spousal abuse. What if the fact pattern had involved a husband who never physically abused his wife, but engaged in the same Internet behavior as the husband in *Nadkarni* (i.e., improperly accessing his ex-wife’s confidential emails and threatening her)—would this constitute abuse within the meaning of the DVPA? In other words, will a fact pattern only give rise to a “disturbing the peace” analysis if there are prior acts of domestic violence in a relationship? The Court in *Nadkarni* most likely viewed the husband’s threats in a more serious light as a result of his prior physically abusive behavior. Furthermore, what if a former husband accesses his former wife’s email messages but does not subsequently threaten to use the information against her—would this constitute disturbing the peace? Accessing the confidential emails of a person would most likely “destroy the mental or emotional calm” of any reasonable person because for the most part people have an expectation of privacy. However, the subsequent actions a person takes in order to disclose the information may or may not constitute disturbing the peace depending upon the harm that is caused by these actions.

Additionally, the Court in *Nadkarni* demonstrates that contrary to conventional expectation there is no right to oral testimony in a domestic violence trial; rather it is in the trial court’s discretion to allow the presentation of oral testimony during an individual’s application for a restraining order under the DVPA.

**References:** CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed.,

§§ 95.30[6], 130.09[2] (use of oral testimony at hearing), 96.03[1] (definition of abuse), 96.05[2],[8] (ex parte protective orders), 96.06[1],[2] (protective orders after notice and hearing).

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## JUDICIAL COUNCIL

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### Forms, Rules, and Standards

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### New and Revised Rules and Forms Become Operative July 1, 2009 and January 1, 2010

*The Judicial Council has adopted numerous new and revised court rules and forms, operative July 1, 2009 and January 1, 2010, that are of interest to family law practitioners. In the discussion below, forms and rules changes are operative on July 1, 2009 unless otherwise noted, and particularly significant rules changes are briefly described in italics in brackets following the short titles of the affected items.*

#### New and Revised Forms

**Family Law Forms.** New family law forms adopted for mandatory use include: Cal. Judicial Council Forms FL-336 (Order to Pay Waived Court Fees and Costs (Superior Court)), FL-337 (Application to Set Aside Order to Pay Waived Court Fees—Attachment), and FL-338 (Order After Hearing on Motion to Set Aside Order to Pay Waived Court Fees (Superior Court)).

Revised family law forms adopted for mandatory use include Cal. Judicial Council Forms FL-110 (Summons (Family Law)), FL-800 (Joint Petition for Summary Dissolution of Marriage), and FL-810 (Summary Dissolution Information).

**Domestic Violence Prevention Forms.** Revised domestic violence prevention forms adopted for mandatory use include: Cal. Judicial Council Forms DV-100 (Request for Order), DV-110 (Temporary Restraining Order and Notice of Hearing (CLETS-TRO)), DV-120 (Answer to Temporary Restraining Order), DV-130 (Restraining Order After Hearing (CLETS-OAH) (Order of Protection)), and DV-170