

When Words Collide

By Mitchell A. Jacobs and Jami K. Fosgate

Litigants in family law matters cross the entire spectrum, from parties who amicably resolve the issues without counsel to those who are so consumed emotionally by the failure of the marriage that the conflict continues long after the judgment of dissolution has been entered, sometimes for many years.

It is not unusual for one or both parties to voice a desire to "get revenge" on the other, and the Internet has made it much easier to criticize and harass the former spouse or disseminate personal and private information in an attempt to "hurt" him or her. Are there any steps a party and his family law attorney could or should take during the dissolution proceedings to protect against an angry former spouse's attempts at character assassination? A recent decision from the 4th Appellate District Court of Appeal in San Diego is instructive.

Evans v. Evans, 162 Cal.App.4th 1157 (2008), involved a civil case brought by a man against his former wife. Thomas Evans is a deputy sheriff for San Diego County. He and his former wife, Linda Evans, were married in 1985, separated in 1998 and a judgment of dissolution was entered in 2002. But that was not the end of the story. For the next five years, the parties had numerous hearings for ongoing conflicts over child custody, child support and other issues.

In March 2007, Thomas filed a civil suit against Linda and her mother, alleging various causes of action including harassment, slander, defamation, common law torts, breach of privacy and breach of contract. Thomas sought a temporary restraining order and preliminary injunction. He alleged that Linda and her mother were "engaging in slanderous and harassing conduct" against him. Thomas stated in his declaration that in April 2005 Linda had filed false internal affairs complaints against him with Sheriff's Department and with other government agencies, alleging child abuse, lying, falsifying departmental reports and abuse of position. Criminal and internal investigations were conducted and Linda's claims were found to be unsubstantiated and/or unfounded.

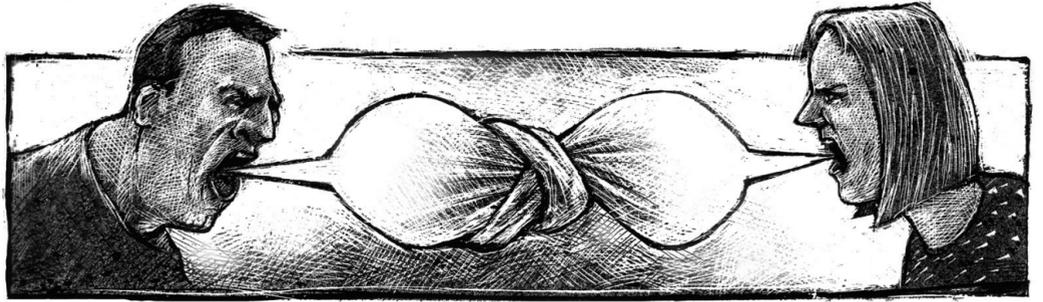
Thomas also alleged that in December 2006, his superiors told him that the sheriff and district attorney had received letters about him that were "very defaming in nature" and that in March 2007, Linda had

filed another "harassing request" to the Sheriff's Department about him. Thomas alleged that he believed Linda's communications with the department were a major factor in his inability to be promoted and that her conduct embarrassed him and caused him to seek a less prominent job within the department.

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Thomas' civil complaint also alleged that in December 2006, he learned that Linda and her mother had placed information about him on the Internet, including defamatory comments about Thomas as a sworn law enforcement officer and comments about the lawyers, judges and counselors involved in the family law case. Thomas also alleged that Linda's mother had gained access to his family court medical records and financial records and published the information online, but he did not submit any evidence of these postings. Thomas only submitted a copy of Web site pages showing statements from a declaration by Linda's mother in the divorce case accusing Thomas of physical abuse and harassment against Linda. Thomas also submitted copies of Web site pages in which Linda posted statements accusing him of physical abuse against her and their son.

On April 18, 2007, the court issued the preliminary injunction, which provided that



Linda and her mother were: enjoined from publishing false and defamatory statements and/or confidential personal information about Thomas on the Internet, and from contacting his employer via e-mail or otherwise regarding Thomas, but since Thomas worked for the Sheriff's Department, they would not be prohibited from calling 911 to report criminal conduct.

Linda filed a motion for reconsideration that was granted, but after holding another hearing and considering Linda's different facts, the trial court reaffirmed its prior order. Linda, who was representing herself, filed an appeal. The Court of Appeal reversed and remanded, finding the trial court's preliminary injunction was overbroad, vague and an unconstitutional prior restraint before trial. The Court of Appeal did provide valuable guidance to family law attorneys as to how their clients might be able to gain injunctive relief in high conflict cases.

In discussing Thomas' request for an injunction to restrain Linda from making false and defamatory statements, the court pointed out that speech on the Internet is accorded the same First Amendment protection as other forms of speech. It also found that because there had been no trial on the merits to determine whether any of Linda's statements were false or defamatory, and because Thomas had not adequately delineated which of Linda's future comments might violate the injunction, his request for a preliminary should not have been granted as to Linda's alleged false and defamatory statements. Prior restraint of speech is highly disfavored and presumptively violates the First Amendment, even when the speech is expected to be of the type not constitutionally protected, such as malicious, slanderous and defamatory statements. It is extremely difficult for a client like Thomas, who is embroiled in a high-conflict family law case, to get a preliminary injunction against a former spouse for statements that have not yet been found to be defamatory at a trial on the merits.

Thomas' request for an injunction to

prevent dissemination of his confidential personal information involved a different analysis. The Court of Appeal explained that Linda's right of free speech must be balanced against Thomas' right to privacy protected by the California Constitution. In this case, the trial court's preliminary injunction did not define "confidential personal information," so it was not sufficiently clear to determine whether Thomas' privacy rights outweighed Linda's free speech rights. The Court of Appeal also stated that without a definition of "confidential personal information," Linda had no way to know what she was prohibited from publishing on the internet.

The court advised that for certain information, such as Thomas' telephone number, address and Social Security number, Linda could properly be restrained, especially since Thomas is a law enforcement officer. But in the trial court proceeding, Thomas had not mentioned that Linda was publishing that type of confidential personal information. Instead, Thomas alleged Linda was putting information about the divorce proceedings on the Internet. Although the Court of Appeal pointed out that contents of a divorce file are "historically and presumptively" a matter of public record, it also gave guidance to the trial court as to what information could be protected from disclosure. Confidential personal information includes information that would harm the best interests of the children if publicly disclosed; information obtained through discovery; information that would compromise a person's financial security; or information that would compromise a person's personal safety.

Thomas' request for an injunction prohibiting Linda from contacting his employer, the Sheriff's Department was more problematic. The Court of Appeal found that Thomas presented no evidence that Linda's complaints were numerous and/or improper and he presented no evidence that he would suffer substantial detriment if the injunction was denied pending trial. Most importantly, a person's right to report

to law enforcement personnel seeking investigation of alleged wrongful activity is absolutely privileged. The Court of Appeal suggested there were less intrusive means to limit Linda's complaints to the department, such as the establishment of reasonable requirements before she could file a complaint, and if the department believes the complaints are unwarranted or burdensome, it has the authority to take administrative actions to address the problem without interfering with her right to free speech and ability to contact law enforcement or other government agencies to report alleged wrongful activities.

The *Evans* case is instructive to a family law practitioner who finds herself or himself representing a client in a volatile, high-conflict case. First, if the client alleges that the other party is publishing false and defamatory statements to friends, neighbors, co-workers or others, the attorney must explain that it will be difficult, if not impossible, to get a preliminary injunction to restrain the other party's right of free speech prior to trial. The client should be counseled that he or she will need to foot the bill for a trial on the merits and only if after the expense of a trial the judge or jury finds the other party's statements false and defamatory will an injunction prohibiting the other party from repeating those statements be issued.

When the client's complaints concern the other party's publication of confidential personal information, such as through Web site postings on the Internet, there is a greater likelihood a preliminary injunction may be obtained prior to a trial since the court must balance the client's right to privacy against the other party's right of free speech.

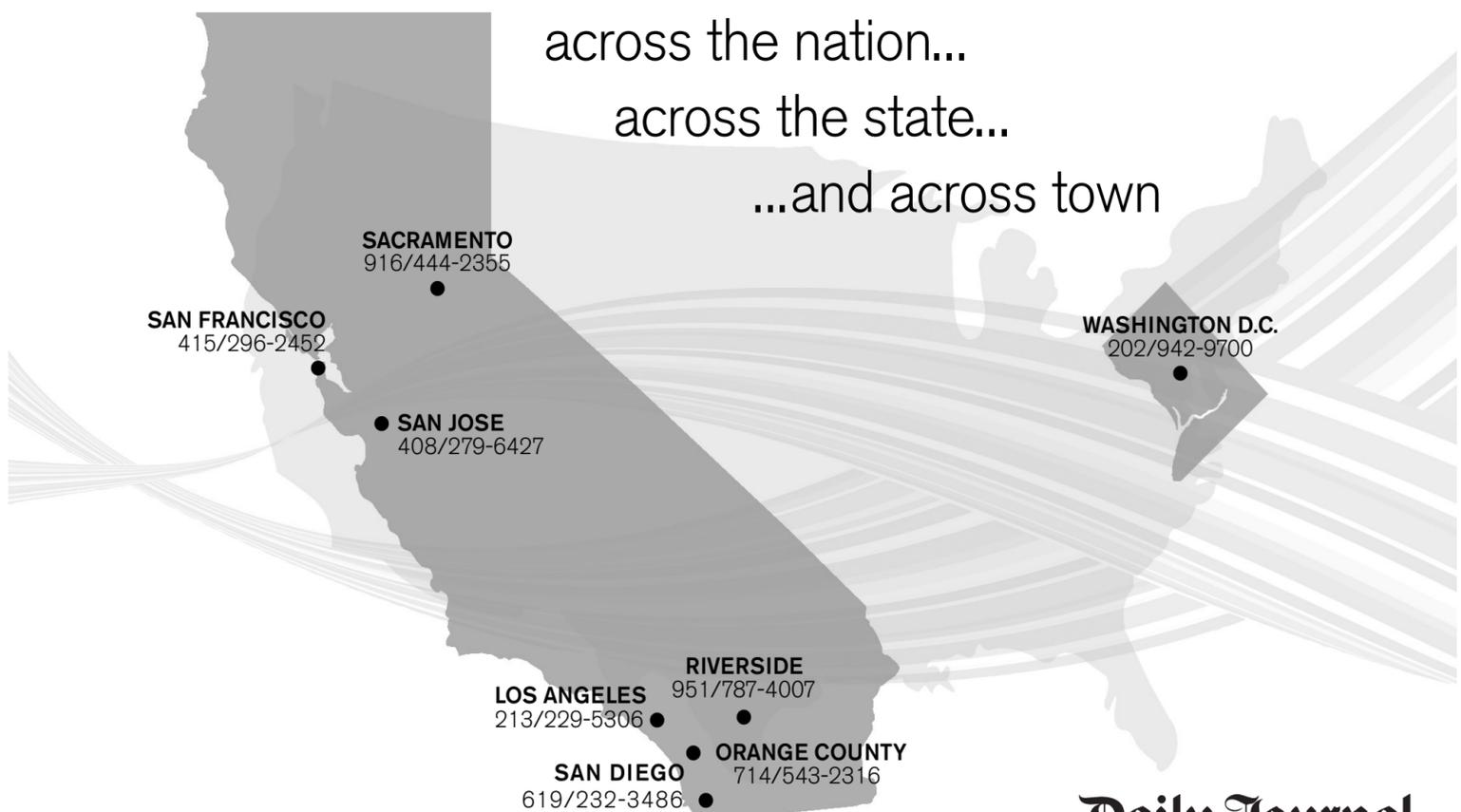
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