

Changing Attorneys Once Divorce Proceedings Have Started

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Toby Kleinman & Daniel Pollack | December 22, 2021



It is not unusual for a litigant to seek to change attorneys during divorce litigation. Procedurally, it is a fairly simple task to accomplish. A new attorney is retained by a litigant and then some form of a substitution of

attorney is filed with the court. The new attorney can then enter an appearance on behalf of the litigant. But in many cases that is not the end of the story. There are times when clients change their attorney multiple times or the adversary attempts to use changes of attorney against the litigant in a negative or derogatory fashion. Why does this happen and what can be done?

Many divorce cases are straightforward. Parties find a way to divide assets and share parenting of children in an agreeable way. Only about 2%-5% go to trial. Of the small percentage of cases that do not resolve amicably, a high percentage of those cases involve issues of domestic abuse. Where there is domestic violence (DV) there are frequently allegations of mistreatment of children. Reputable research indicates that there is a causal connection between spouse abuse and child abuse.

Trust between the attorney and litigant is a crucial part of a divorce proceeding that involves domestic violence. Domestic violence cases are more labor intensive and require special knowledge to properly litigate. As a result, a domestic violence victim may not feel properly supported or understood and the attorney may not present the case well to the court. In fact, it's important to people who represent victims of domestic violence actions to understand that the case can mimic criminal behavior. This is true whether or not criminal action is taken. The victim needs similar identical attention. Many DV cases have an adjacent crime. This needs to be recognized by family lawyers even where that is not being criminally prosecuted.

Domestic violence does not stop merely because of a divorce proceeding. A well-trained family lawyer should regard this type of matter as a case following a serious crime in order to give fair representation in family court. Abusers tend to fight for custody of children. When they do so they open the door to what is commonly known as "Deny, Attack, Reverse Victim and Defendant" (DARVO). This is a common strategy used by

abusers. Changing attorneys opens the door to additional attacks of this type. Therefore, a new attorney coming into a case where there are allegations of DV—even if they have not themselves been independently litigated—needs to be ready to deal with these attacks. In short, it is up to the new attorney to put address DARVO in an assertive way.

Some litigants change attorneys when they feel a problem with communication or the relationship just doesn't "feel right," or the litigant does not believe their attorney has the requisite expertise. The decision to change attorneys may be prudent. This can best be done by securing recommendations from family, friends, or other domestic abuse victims. However, changing attorneys can delay a case and possibly increase legal fees. If the case is already on track for trial, the court may be reluctant to delay. Unwittingly, a litigant may be viewed by the court as unstable—not a desirable impression to make. So, it up to the attorney to have ready answers on any or all of these possible issues.

Family lawyers are not prosecutors, yet a DV case often must be litigated as if a family lawyer is indeed a prosecutor. When they don't, the litigant may feel as if their children and their rights are in jeopardy and that their own attorney has empowered the adversary. Switching attorneys may set the case on a better course. Therefore, if the attorney-client relationship is not working and if there does not seem that a way can be found to resolve the litigant's concerns, changing attorneys can be a wise move. The new attorney needs to be prepared for all of the potential issues raised as a result, especially where there has been prior DV.

In cases where there has been no domestic abuse many litigants also change attorneys. They may do so to try to reduce fees or to settle a case which has been amped up and aggressively fought. In these cases, mediation is a constructive alternative. Where DV or custody are not

issues, litigants frequently simply seek easier resolution and sometimes attorneys need to be prepared for that as well.

There are other issues that can be raised where a party changes lawyers, including concerns from the court. There may be issues raised in court previously that the new attorney is not aware of and there may be no transcript. There may have been “in-chambers” conferences where there is no ability to have transcription as there was no court reporter or no audiotape. Critically, whatever the issue is that arises, it is up to the attorney to be ready to deal with it.

The decision to switch attorneys is a difficult one. An attorney with integrity will understand that.

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