

Pushing Contempt in Domestic Violence Cases

Attorneys should seek to have a good rapport with a judge except where it interferes with appropriate, zealous advocacy. It is better to have a judge's respect for proper advocacy than to be thought of as "nice."

Toby Kleinman and Daniel Pollack | December 28, 2021



“If you plan to be a trial lawyer, you are not doing your job unless you are pushing contempt,” said one of our law school professors many years ago. What does that mean? We all know what “push back” is—a negative response to a proposed change or plan. To “push back” in family court

means arguing during a motion or making objections during a trial. Strong advocacy is not about getting a judge to like you. It is about having the respect of the court through proper objections and motions. It means being ready to file emergent appeals where there is risk of harm to the client.

Ultimately, being a good trial lawyer—as a family lawyer—means you can't come to court “as if” to mediate. It means you must be prepared for courtroom battle. Too many family lawyers are taught to “go along to get along,” to make motions to seek relief but not to risk antagonizing a judge. That might be fine in many cases but where there is domestic violence it doesn't work.

Virtually all domestic violence statutes mimic behavior that is forbidden under the criminal code. Yet where domestic violence is alleged under a domestic violence statute the victim does not have the weight of the state prosecuting the criminal behavior. It is either done pro se, by themselves, or by a family lawyer.

The victim's attorney has the obligation of being a prosecutor of a crime. They have the obligation to put on the strongest possible case of admissible evidence and to object at every turn to inadmissible evidence. It is noteworthy that where there are children many of these cases later become contested custody cases. If the case is lost at this stage of a proceeding the very fact of the loss will be used against this victim as if the victim is a liar. Therefore, at the hearing for domestic violence, attorneys need to be ready to take on a skeptical court—where courts have been told victims use domestic violence as a vehicle to get an advantage in custody decisions. The job of a court is to rule on issues

before it, but, if an attorney feels a particular issue is improperly resolved by the court it means to raise it again and again. Risking contempt does not mean being rude. It means being willing to push back, conveying the message that you do not fear contempt.

Attorneys should seek to have a good rapport with a judge except where it interferes with appropriate, zealous advocacy. It is better to have a judge's respect for proper advocacy than to be thought of as "nice." Sometimes repeating an issue with the same arguments with statements like, "but Your Honor ..." or, "Your Honor, I believe you are mistaken ..." or "Judge, there are additional facts you do not seem to have considered ..." is annoying to a court, and it may be scary to a lawyer to hear a court's annoyance. Nonetheless, persistence can be the route to proper advocacy.

Many matrimonial courts are permitted to employ relaxed rules of evidence in the interest of justice in determining best interests of children. However, at trial for domestic violence the court rules are the same as a murder trial and the attorney has a right to have the court adhere to them. The risk factors of not adhering to evidence are also important to note at any custody hearing as there is a strong connection between adult domestic violence and child abuse.

Abusers are masterful at twisting facts, at placing on to the victim what is really true of themselves. They are skilled at oral attacks and they seem cool as they deny their victimization and often seem appalled at even having been accused. Sometimes, it's hard to believe that the person in court who has been accused is actually a violent person in the privacy of their home. It is that very schism, that tragic irony, that the court will see

and feel and wonder about. It is the very reason why strong fearless advocacy is so important.

The Fourth Amendment requires that every person has the right to feel safe and secure in their own homes. The Fourteenth Amendment guarantees that the state will enforce that security, by guaranteeing equal protection of the law to every person. It is the lawyer's job to help ensure that right before a family court judge. And it's the lawyer's job to have the court understand each victim's unique circumstances of being victimized. The lawyer must be able to express the same incredulity at the abuser's behavior as if they were in front of a jury.

The bottom line is that the notion of children needing two parents is not relevant to protecting children from a violent parent.

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