

Domestic Violence: Do's and Don'ts for Court

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Where there has been domestic violence and someone seeks appropriate restraints both attorneys and litigants often need guidelines to ensure that victims are adequately protected and actual perpetrators are recognized by the court.

Domestic violence victims may initially fail to report abuse and later find themselves accused of violence by their batterer, often during the throes of a child custody dispute. These people are termed here as victim defendants. Victim defendants need to know how to defend themselves in court and how to cross move to the court about the violence they experienced.

In every hearing to determine domestic violence, a court is faced with the dilemma of whether to grant or deny protection.

Each state uses a different standard of proof, but the procedures are similar. Presenting a good case may positively affect later child custody decisions and distribution of assets where there is a civil case for damages. A defeat in court where the accuser has sought protection may put the victim in a circumstance where the victim may lose custody and may be made to appear non-credible.

A note about language: most, but not all victims of domestic abuse, are women. Victims can of course exist in same gender relationships; they can be men, transgender, etc. For ease of writing and because most victims are women, this article identifies the victim "she," the "wife," or other similar terms.

Attorney for the Victim and Victim as Plaintiff

Representing a domestic violence victim is difficult. You are essentially a prosecutor with a civil standard of proof rather than a criminal standard of proof. Your client victim may have credibility problems. The burden of proof is on the victim to show that she is a victim at the hands of the defendant perpetrator, yet she may be torn between saving her marriage, herself, and her children. She may be ambivalent about the abuser as a parent.

Even when a victim ultimately feels forced to seek legal protection she may still feel she loves the abuser. Consciously or unconsciously, she may make excuses for her abuser. She may be very angry. When one is angry it may be difficult to appear sympathetic yet it is imperative that an attorney assist the client to appear in the light. A victim may also appear robotic. A display of anger in court may foreclose sympathy by the court, especially if the perpetrator seems very cool and sympathetic and portrays himself as a victim of her anger, which often occurs.

To accomplish sympathy and avoid presenting as angry requires the attorney to ask specific 'feeling questions', as a follow-up to questions about what happened to cause her to seek court protection. The incident which instigates a victim to seek a restraining order may be less violent than prior incidents – yet she may feel more at risk. There may have been threats by the abuser to harm her or the children. Any history of the need for medical assistance is important to present to the court even if the abuse was not reported to a medical professional.

Obtaining details of the initiating incident and whether children were present should be elicited by the attorney. Ask if the victim was ever violent in response, as a victim may have misbehaved during the incident or at other times and be embarrassed or fearful that an attorney won't believe her about the precipitating incident. This information must be known before court as it may mean the difference between getting a protective order or not. If there has been misbehavior this should be raised during direct testimony so it can be adequately explained.

Once testifying on direct examination, a victim should first recount the history of violence. The court may have only allotted a short amount of time but presenting testimony regarding the incident without context can be fatal. Too often victims gloss over poignant details and memories, even regarding recent events. Therefore, the overall history should be presented first. Telling a story, like making a movie, is an art, so if the victim can vividly tell the story of the violence the presentation will likely be descriptive, and actual fear will likely be displayed by the victim.

The victim must also be prepared for cross. Cross examination can be used as a tool to say things that were objected to or forgotten on direct. A withering cross-examination will likely try to attack the victim as a liar, so the victim must be prepared to hear that attack and not get angry. If the court sees a victim as angry it may believe the victim is in court out of

anger and not out of the need for protection.

Child witnesses may be important if they heard or saw anything, or if they were present during prior incidents. Child witnesses are placed in a difficult position. However, testifying can give them confidence to know that a parent is seeking to protect them. It may also help if the abuser later seeks custody of the children.

Attorney for the Victim as Defendant

Survivors of domestic violence may find themselves as defendants, with their abusers accusing them of violence. Of course, reactive violence cannot be condoned, but we are aware that there are circumstances where victims act or react violently. Sometimes it is essential to the victim's self-defense.

These victims may have portrayed to the outside world as if there was no abuse and they may never have sought restraints. At some point, for any number of reasons, something changes. It may be during the pendency of divorce or a threat from the abuser to take their children. The victim may act out by throwing something or screaming or saying something that makes it appear to an observer that indeed they are perpetrators. There are cases when the perpetrator has decided to tape (audio or video) his victim so that he behaves "in control" and the victim seems out of control. These victims may know their abusers so well that they may have known

that in this instance they were actually safe enough if they acted out in negative ways.

Even though the abuse victim may have behaved inappropriately in this instance – and even assuming there are tapes of the entire incident – unless it is agreed to be withdrawn, we recommend filing a cross application for restraints. In doing so, even if you lose the restraining order you get to put all information in context and present the history before the court to show who the actual abuser is.

After filing cross complaints, the victim will be a defendant and will therefore go on the stand after the abuser. One must cross examine the defendant not only as instigator for the event being tried, but as to his history of abuse in the relationship. Use the tape to demonstrate that the abuse set up the plaintiff by doing a deliberate and provocative act. The "defense" may try to deflect by asserting that the victim could not have been afraid. This can be answered by the plaintiff as she will likely be able to explain the difference between times the abuser has actually been violent and times when he threatened but was not violent.

Bringing in a domestic violence expert to further explain the victim as someone who can be provoked to react violently is helpful to the court. Although it is unusual to produce other witnesses at a restraining order hearing, where a victim is a defendant is a circumstance to do so. The plaintiff must testify as to the history of domestic violence. Nuance is everything. Because domestic violence is

a part of coercive control, through expert testimony it can make clear that part of the controlling atmosphere was the setup and taping of this particular incident.

Many defendant victims cannot afford an expert and there may be no witnesses. In these cases, attorney argument and detailed examination of the witness may be the difference between protecting a victim or not. When you examine the victim, her explanation of any escalation of violence is as important as is the coercive control. Victims often start out “going along to get along,” but when she ultimately disagrees he coerces or threatens. The threat may be something minor at the outset but escalates as the perpetrator’s desire for control escalates. If you can walk the victim through the early stages of how the physical violence began and then escalated over time her credibility will be enhanced.

As a defendant victim of domestic violence, her misbehavior may be self-defense. That does not require an apology. Rather, be remorseful and explanatory. Even though a victim may not have been abusive and the actual abuser is seeking restraints she may still have acted in a way that a court views as improper.

When an abuser is cross-examined prior coercive control should be raised. How many times a day did an abuser call the victim? How many times a day did she have to report where she was, what she was doing, who she was with? How limited was her financial freedom? Was she limited in conversing with family or

friends? Did she get the ‘third degree’ when the abuser came home? Describe the areas of coercive control and not just the incident presently before the court. Special domestic violence training is essential for judges. Psychologically, domestic violence is often counterintuitive as victims may seem rageful and not engender sympathy while abusers may appear sympathetic. This counterintuitive nature of domestic violence makes it even more critical to give detailed explanations.

Some states have created specialized domestic violence courts. These help judges specialize in ensuring proper understanding of the testimony they hear. By specializing in domestic violence offenses, these courts are more victim sensitive and more sensitive to the issues that may follow.

Whether a specialty court or not, a court can ensure that all parties have unobstructed access to their rightful legal protections while simultaneously ensuring the safety of the litigants.

In general, the less a court exudes a demeaning, harsh attitude the less likely a victim will feel re-traumatized. When a case begins a court has a clean slate. Each piece of information the attorney and plaintiff victim want a court to consider must be presented and proved by competent evidence.

There are three critical things to know about evidence: 1) It must be relevant; 2) It can be documentary; and 3) Testimony can be by way of direct and cross examination of witnesses. Most states have an all-inclusive court rule that allows rules to be

modified in the interest of justice especially where protective orders are necessary. In emergencies a court may not want to hear history. It may want the parties to present short pieces of information about an incident only and it may be essential to argue how the history is relevant and critical to the case.

Domestic violence affects everyone. On a societal and personal level, it can lead to health problems, homelessness, adult and juvenile law enforcement interventions, unemployment, and a host of other adverse effects. Improving how domestic violence cases are handled in the courtroom, whether from the perspective of an attorney, a victim, a child, or a judge, can only be beneficial for everyone involved.

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