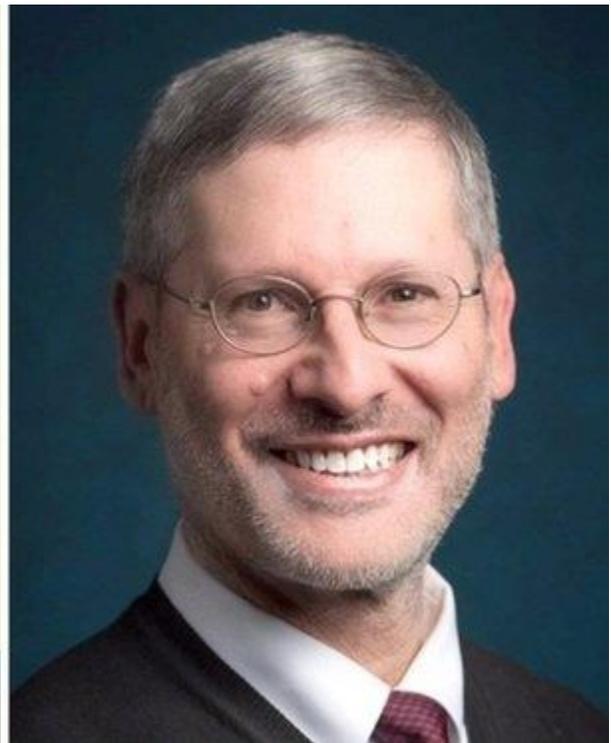


Child Custody: What If There Are Allegations of Domestic Violence?

In this Family Law column, Toby Kleinman and Daniel Pollack discuss the issue of domestic violence during the pendency of a legal matter.

By **Toby Kleinman and Daniel Pollack** | September 04, 2020 at 12:46 PM



Toby Kleinman and Daniel Pollack

Women sometimes raise the issue of domestic violence during the pendency of a legal matter. (For ease of writing, and because most

victims of domestic abuse are women, this article identifies the victim of abuse as “she,” “wife,” or similar terms. Similarly, because

most batterers are men, masculine pronouns are used.). It may be discussed when issues of child custody or visitation get raised or when the victim of domestic violence gets accused of being inappropriately protective of a child. It may surface, too, when the client changes attorneys. Sometimes, women mention violence early on in litigation and the attorney dismisses it or suggests not raising it in court. Men who commit domestic violence may be intelligent, polite, calm and cool in public yet still be violent at home. Believing that the person seen in court with a likable demeanor is a violent man is counter intuitive. So, what should an attorney do?

Attorneys need sufficient knowledge about the idiosyncratic nature of domestic violence to adequately discern whether or not to raise the issue of marital violence in court. Studies show that domestic violence is

underreported by women and that these victims downplay domestic violence, often to their detriment and to the detriment of their children. Once a victim raises the issue of domestic violence with counsel, how should an attorney gauge the need and manner to bring the matter in litigation going forward? As importantly, how does an attorney new to a case in the middle of litigation decide how and when to raise and possibly litigate the issue of domestic violence and argue its effect on children?

Some attorneys counsel their clients not to raise the issue of domestic violence at all. This is generally an error. A detailed history of domestic violence in a marriage is frequently preparation for later attacks on the victim. This is true even where an order of protection is not being sought. The issue becomes a dilemma for an attorney who takes over a case during the pendency of litigation.

In both cases it is important to provide the court with a detailed history of domestic violence, regardless of whether the history is being used to specifically seek any type of relief as a result of it.

Therefore, attorneys should consider having a domestic violence expert do a battered woman evaluation where there are children. This will help the **attorney understand the victim's** presentation, if necessary, have the evaluator testify at a protective order or custody hearing, or even later in the litigation if the matter is fully tried, and assist a custody evaluator appointed by the court who may have insufficient knowledge of domestic violence. Therefore, it is important to retain an expert sooner than later. The expert report shared with a custody evaluator can be especially helpful where it has not been previously used in court.

Batterers use power and control. These behaviors will not stop because a marriage is breaking down. Indeed, the need for control may be heightened during this time. They may do so by calling the victim a liar, by accusing her of any problems between him and the children, and by using other attacks such as accusing her of alienation and gatekeeping. They may do so even where the victim is behaving completely appropriately in her parental role.

For these reasons, regardless of whether a victim feels the need for physical protection, the court should be made aware of a history of violence and threats so that if the batterer seeks custody at any point the court will already be aware of the relationship and the victim does not have to first describe the incidents as a defense for behavior.

Here are some important points attorney should bear in mind:

- Most domestic violence perpetrators are men. According to one [study](#), one in four women experience “... **severe intimate partner** physical violence, intimate partner contact sexual violence, and/or intimate partner stalking with impacts such as injury, fearfulness, post-traumatic stress disorder, use of victim services, contraction of sexually transmitted **diseases ...**”
- Domestic violence is [underreported](#).
- There is a [causal connection](#) between domestic violence and child abuse.
- Children exposed to domestic violence are more at risk for depression and other issues.
- There are studies that show evaluator bias in courts where protective parents from violent homes lose custody of their children to abusive husbands.
- **Professor Joan Meier’s** recent [study](#) shows that when violence to children and women is raised during

custody litigation, the person who raises the issue frequently loses custody.

Let’s assume a person seeks representation who has not previously raised domestic violence and the family matter is already being litigated. Assume also that the client has not previously sought a protective order. The client tells her attorney there was violence in the home witnessed by children, and this issue has not been raised before. **The victim’s prior attorney told** her not to raise it. The attorney must first decide whether or not the client should seek a protective order. That issue is not and should not be a strategic one. Whether to seek a protective order is a matter of safety for the victim and children. According to the victim, are there new threats from her partner? If the client does not feel there is a current risk to her, the question may be how to raise the

issue of domestic violence for the sake of protecting the children

An attorney should give information to the client regarding the standards the court will follow in granting an order of protection. In this way, the attorney can help determine how to prove the prior history of violence as well as the **client's current circumstance**, especially where there were previous and current threats. An early expert report can be exceedingly helpful in this regard.

An attorney should also discuss with the client how those legal standards can likely be met, and, if not, how to best proceed to maintain safety. Sometimes, children should testify. This can be a valuable addition to an expert opinion confirming that the woman being is being battered. Preparation is key. How litigation begins sets a stage for everything to follow. It is imperative that the

client learn how to withstand an intense cross examination.

If a protective order is sought but not granted, this fact will likely be used by an adversary throughout litigation to try to prove that the victim habitually lies. It will also likely be used to attack the victim as seeking to alienate the children from the spouse. This can be a setup to losing custody. It may also set the stage for an evaluator to recommend that custody be given to the violent parent. This is why having an expert evaluate the client early is helpful. It is different than countering an evaluation. That early evaluation, done by a licensed professional who is an expert in domestic violence, can then be given to the custody evaluator.

Because of the connection between child abuse and spouse abuse, children who witness abuse or who are abused themselves, need protection. What types of

protections are needed? If the children do not appear in danger at the time a protective order is sought this must be acknowledged. On the other hand, the attorney should raise the connection between spouse abuse and child abuse to alert the court to potential future issues.

If a client does not feel the need for immediate protection, and feels her child is safe in the care of the other parent, yet says the marriage has historically involved violence, it is also imperative to make a record of that history, even by way of affidavit.

The apparent dilemma of whether or not to present the issue of violence to the court early on is really no dilemma at all. The only dilemma is whether or not the litigant needs an order of protection, and, if not, what document filed with the court early in litigation is the best way to present this history of violence to

the court. This will protect the **clients' credibility and can actually enhance the client's credibility** long term if she later raises similar behavior later during litigation.

Toby Kleinman, a New Jersey attorney and partner at Adler & Kleinman, has litigated domestic violence, child custody and abuse cases, and has been a consultant in cases dealing with domestic violence and child abuse in over 30 states. Daniel Pollack is a professor at the School of Social Work at Yeshiva University in New York. He has been an expert witness in more than 30 states. They can be reached at toby@adlerkleinman.com and dpollack@yu.edu, respectively. This column is written for general informational purposes only and should not be construed as NY-specific legal advice.