

Preparing evidence for use as exhibits at trials involving domestic violence

Toby Kleinman and Daniel Pollack | April 7, 2022



No one likes to think they may have to go to trial, especially in a family matter. The fact is that most family cases resolve amicably. Of those that don't settle by agreement and go to trial, many involve issues of domestic violence and/or child abuse. Domestic abuse and child abuse are co-morbid. In other words, even after the adult parties separate due to interpersonal violence, there is a strong connection between

perpetrators who batter their partners and those who abuse their children. Therefore, any and all potential evidence should be maintained, organized and useful for trial.

Children are also known to suffer from the battering of their parent even when they themselves are not physically injured. Therefore, in cases involving domestic violence, while not inevitable, a trial is more likely and child protection may be at the heart of the trial. Accordingly, detailed preparation is critical, especially for victims where there are children in need of protection. Attorneys need to be prepared, and they must prepare their clients. Documentary evidence assists the trier of fact. It can shine a light on the credibility of the victim and therefore the child's need for protection. In doing so, it can also cast doubt on the credibility of the abuser.

Trial preparation begins with knowing the victim client's detailed relationship history with their adult abusive partner. The client should write the history of the relationship, describing not only the physical violence, but what incidents or behaviors lead up to the violence regarding each incident. This history should go back to the relationship before the marriage as that is often where coercion and threats begin even before physical violence has been used as a means of control. In cases of emotional abuse without physical violence, the history should also be written. Details such as name calling, humiliation, labeling followed by apologizing, and gas-lighting behaviors, as well as how an argument started, are important to contextualize events. That history is a critical guide. It is a guide for pretrial and a guide for a trial where the well-being of children is at issue. That evidence is the telling of the story

of how the violence began, escalated, continued, and why the matter requires a court to intervene and protect.

The client should also provide any writings between the parties even before the separation that illustrate their history, especially if threats or coercion were used. It is important to note in the written history any behaviors by the client which an observer might see as negative so they can be explained to the court. These writings are the beginning of preparing for trial through documentary evidence. Often, where a relationship is more problematic, the violence is more intense, shifting to control of a child and their welfare. Putting the history of the deterioration of the relationship together with escalating violence creates an important picture for the court where child protection is at issue. This can often be seen in writings between the parties and are all potential trial exhibits. Some will be introduced pretrial. For example, whether or not a protective order is sought, it may be indicative of reasons to limit a violent partner's access to a child. They may also show problems a child has had during this same period, which may have started as the violence began. Other documents will be used to tell the client's story later with proofs, and some will be used for cross-examination either to refresh the recollection of the violent party or to show the veracity of your non-violent client's testimony. Noteworthy, credibility is always within the purview of the trial court. In that regard, batterers rarely admit their battering behavior even where there is proof. They tend to make excuses and blame the non-violent parent either as having provoked them or having caused the victim accidental injury. Regarding the child, they often make up reasons for an impaired relationship where one exists and accuse the victim of having alienated or manipulated the child during the marriage to parrot the victim and try

to discredit the child. With regard to emotional abuse, a written history of harassment can show patterns of behavior and the long-term effects on adult and child victims. Name calling in texts and vulgar language are often forms of intimidation.

While putting together a chronological history, the client should include names of any witnesses as well as any calls to law enforcement, the department of social services, or similar calls to family or friends. A trial exhibit file should be created and indexed by date first, and later by subject matter, including this data. Phone logs, emails and texts are all a part of these exhibits. When an abuser tells an untruth, lie or misleading statement, knowing the detailed facts from these documents and having these written documents can mean the difference in a cross-examination between a court finding the party credible or not.

Collecting documents at the beginning of the case and having the client forward each written contact between the parties and potential witnesses thereafter serves as advance preparation for trial. It is work typically not done by family lawyers but is critical where there has been abuse. A lawyer's assistance in writing is also helpful. All of these documents will assist in formulating motions as they arise, and later at trial, to tell the story about how the relationship broke down and why. While it may not directly point to physical battering at any one moment it may show other forms of emotional abuse, coercion and control. Abusers often use questioning as a form of non-overt "threats." The same question may be repeated over and over again in separate emails or texts or the same requests made again and again separately by the batterer. Each email or text may seem innocuous enough unless one sees the entirety of those writings. Those contacts will be used invariably to

either push the abuser's "story line" or to accuse the protective parent of something such as non-cooperation. Therefore, attorney awareness during the pendency of a matter is critically important to assist the client and to deal with opposing counsel in advance of trial to stop the continuing victimization of a victim.

These documents, and the need to confront opposing counsel on these issues, will also be the proofs of credibility for the victim. When the parties separate, even temporarily, the client should not send any angry emails. Attorneys need to coach their clients in this regard. These days, emails can demonstrate a lot. They can show cooperation as to parenting, threats, and other continuing patterns of behavior. In child custody matters, details matter. Phone calls to schedule doctors or dental appointments for children and calls to the parents of friends to make play dates are important as well to show the status quo ante. Be sure to have the client keep a separate calendar that deals only with their issues and the children as far as divorce issues. This calendar can be shared with discovery but it is also a guide to person's parenting style.

Emails and texts can also show attempts at cooperative parenting or failure or obstruction to it. They can show the ability to compromise and put one's own needs aside for the welfare of a child. These can become critical issues with regard to a best interest standard where a batterer says they were a primary parent and are able to compromise. Remember, those who batter often show self-interest and attempt to make themselves be seen as victims. They often present charmingly in public. Therefore, carefully written emails by victims with the help of counsel can make this more evident in email and text conversations.

Throughout litigation, the attorney should be guiding the victim to neutral-type writings, despite understanding the ordinary feelings of anger and frustration at being a victim of someone else's control. This is true even where there is a protective order and written contact is allowed or required.

In these circumstances a survivor is likely angry, but that anger can be seen and judged negatively by the court, and therefore the written contacts should be without any vitriol. They should be written neutrally so that when presented to the court they create a video of the mind for the court in a positive light for the victim. Where anger has been shown, an attorney must be able to still use that evidence and present the anger as normal.

If the issue at hand is victimization of a child, then evidence of a protective parent's responses is important, especially where anger is voiced by them. This anger can then be easily be explained and used as a potent cross examination tool.

Failure to pay child support or make other payments can also be a form of control. Note in the client chronology where support payments are made late or missed altogether. There may not be financial parity between the parties. Whether or not the batterer is the primary financial support of the family, use and abuse of family funds need to be noted. Consequently, bank records may serve as a way of showing the assertion of a batterer to control a family's resources. Everything is important as a potential exhibit: payments to the gas or phone company, rent or mortgage payments. Make notes of who takes the children to

appointments, play dates, and athletic events, and other after-school activities, and who pays the bills both before and after separation.

Occasionally, there are medical records of adult victims and child victims. While these may seem pivotal on their face as proof of an abuser being an abuser, victims may have lied to medical personnel about the nature of the cause of their injuries or their child's injuries. This is a double-edged sword as it makes your client seem deceitful where truth to medical personnel is presumed. That makes records between the parties at that time or near to that time even more important as there may have been threats of additional violent harm.

An evidence file for cross examination of the batterer is also important. Some evidence can be used for both direct examination and cross examination. Sometimes evidence may be objected to during your client's testimony. Anticipating this and preparing for it is important. This evidence can be used to impeach the batterer. An example of this may be information in a medical report that questions how an injury occurred. Additionally, where a batterer denies any harm or threats, but emails make direct or even indirect threats, these should be used to impeach his testimony.

By the times trial arrives, all these potential exhibits will be in date order and ready to present as evidence to a court as your client testifies, and will be able to create a narrative for a court. Most importantly, every exhibit must be seen as a part of a solid trial strategy to show the victimization and need for protection of a child whether or not the child had been actually treated violently. At trial, it will be important for the attorney to make the connection between the adult interpersonal

violence and the impact and harm to children, and the continuing risk to both.

Attorneys generally try to avoid going to trial. Yet, if trial becomes inevitable, your client is an invaluable resource in trying a case with well-prepared, straightforward documentary evidence.

Toby Kleinman is a New Jersey attorney and partner at Adler & Kleinman. **Daniel Pollack**, MSW, JD is a professor at Yeshiva University's School of Social Work in New York. 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 New York-specific legal advice.