
Domestic Violence Trials: Winning the Case and Minimizing the Impact on Children

RICHARD A. DEMICHELE, JR.

The internet is seemingly littered with endless amounts of scholarly text on the impact of domestic violence on children. The academic papers focus primarily on the harm children suffer when they grow up in a home where there is domestic violence or they witness domestic violence. Childhood problems that are often associated with domestic violence can be behavioral, social, emotional, cognitive and or attitudinal problems. Given the severe nature of domestic violence, the penalties associated with a domestic violence conviction, and the impact on custody disputes, domestic violence cases are “high-stakes” for the parties.

While most jurisdictions do not have jury trials for domestic violence cases, an advocate would be well advised to treat a domestic violence bench trial like it was a jury trial. Lawyers can get complacent with a presentation of their case when it is the judge and not a jury making the factual determinations. For some reason lawyers tend to use less demonstrative evidence when presenting their case before a judge rather than a jury.

Most domestic violence cases have two witnesses, the accused and the accuser, and the outcome is usually determined by which party is more credible. The use of demonstrative evidence in domestic violence trials can be critical in winning the credibility battle. Knowing your jurisdiction’s domestic violence procedure and rules of evidence can greatly enhance your representation of your client.

REPRESENTING THE ALLEGED DOMESTIC ABUSER

Minimizing the impact of domestic violence on children really depends upon who you represent. In many jurisdictions there are substantial restrictions

placed upon a parent who has been found to have committed domestic violence. The restrictions and penalties can include being expelled from the party’s home, the presumption against primary physical custody, visitation limitations such as curbside pickup and drop-off or pickup and drop-off at the local police station. Being ordered to live away from the family home has an obvious impact not only on

Richard DeMichele, Jr. is a seasoned litigator, devoting a substantial part of his practice to family law matters. His clients are not only high net worth individuals but also those of modest means whom are going through a divorce or seeking post-divorce relief. Mr. DeMichele is routinely called upon to advise his clients in the areas of alimony, equitable distribution, child custody, child support, visitation, asset valuation, no fault divorce, prenuptial agreements, counsel fee awards and domestic violence. Mr. DeMichele is admitted to practice in every state court in New Jersey and Pennsylvania. He is also admitted to practice in the United States Supreme Court and the United States District Court for the District of New Jersey as well as the Eastern District of Pennsylvania.

Mr. DeMichele is a national, state and local bar association leader. He is a Delegate to the American Bar Association’s House of Delegates and a Trustee of the New Jersey State Bar Association. In addition, Mr. DeMichele is the President of the Camden County Bar Foundation and a past president of the Camden County Bar Association. His past Camden County Bar Association leadership positions include Trustee, Chair of the Family Law Committee, and Chair of the Lawyer Referral Service Committee. He is a frequent seminar speaker and moderator and has been featured on the Camden County Bar Association’s television program Legal Lines. He served on the American Bar Association’s Section of Family Law’s Continuing Legal Education Committee.

the parent but also the children. Likewise, a presumption against primary physical custody has an obvious impact on the parent and the children.

Knowing the penalties that go with a finding of domestic violence or domestic abuse in your jurisdiction is critical to effective representation of the client. In short, if your client is found to have committed domestic violence there will be adverse consequences for the children (at least from the perspective of the recently convicted domestic abuser). The key to minimizing the impact is to make sure that the accused is found to have not committed domestic violence. There is a distinction between a dismissal by the alleged victim and a court's finding after a hearing on the merits of no domestic violence. While some alleged victims will choose to dismiss a temporary protective order on the eve of the hearing for a permanent protective order, it is generally better to proceed to trial and obtain a finding in favor of the alleged accused.

Obviously, if the alleged accused is found to not have committed domestic violence there are no penalties and or limitations placed upon the client with respect to the alleged victim or the children. The vast majority of domestic violence trials are non-jury and come down to "he said and she said" testimony. Preparing your client to testify and being well-versed in your state's rules of evidence is critical to winning these types of cases.

Anticipate Evidence

In preparing your client to testify it is important to anticipate the evidence that the accuser will present at a trial. You should anticipate that the victim will rely on his or her testimony. Typically, the victim will be the first witness called to testify. Often times you can predict what the accuser's testimony will be from reviewing the complaint, police report, or witness statements. Make sure you and your client review all of the available documents in advance of the trial. This will form the basis of your cross-examination of the accuser and your client's testimony.

Be prepared to deal with and explain potential demonstrative evidence that may be offered by the accuser. If there was an altercation there may be one or bloodied clothes that are offered to supplement the testimony of the accuser. Having your client well prepared to explain how the clothing was torn or became bloodied could be significant in determining the outcome of the case and most importantly the client's credibility.

Lastly, be prepared to challenge the admission of evidence if key witnesses do not appear. Often times law enforcement officers will not be available

for a domestic violence trial. If this occurs the prosecution may attempt to admit the police report, booking report, or domestic violence intake forms which would otherwise be inadmissible hearsay.

REPRESENTING THE ALLEGED VICTIM

If you are representing the alleged victim of domestic violence most often they will come to you with an *ex parte* temporary order of protection. The order of protection or temporary restraining order as they are referred to in some jurisdictions will usually give the alleged victim primary physical custody of the children and either suspend or have very limited parenting time for the alleged abuser. Despite the fact that your client may have a temporary protective order you should counsel your client as to effective safety planning for the children. You should consider asking these questions:

- Do the children know what to do if another violent incident occurs?
- Do the children know how to call the police?
- Do the children know how to call family members or other trusted adults?
- Have the children's schools, doctors, and after school care providers been provided with a copy of any protective order? Do these people who come in regular contact with your children know that the alleged abusers not allowed to pick up the children?
- Has your client established a code word to use in an emergency that would alert the children to get away and seek help?
- Have the children been told not to let the domestic abuser back into the home?

In collecting exhibits and other demonstrative evidence consider presenting these items at trial.

- photos of the victim's injuries
- medical records of the victims injuries
- weapons or objects that were used to commit the domestic violence
- weapons that were seized by law enforcement
- police reports for the incident
- police reports documenting prior acts of domestic violence

- prior restraining orders
- phone records
- 911 call recordings
- employment records

All of these items will require the appropriate foundation and testimony to be admitted at the time of trial. Knowing your local jurisdictions rules of evidence will be critical in having this type of evidence admitted. If a particular piece of evidence is critical to your case you may wish to present a bench memorandum to the court in advance of the trial to help insure the proper admission of your evidence.

Ready Resources

Many times client who are victims of domestic violence need more than just a lawyer in domestic violence court. They may need to receive additional services that can directly and indirectly affect the children. As a practical matter you should be prepared to refer your client and the children to appropriate mental health professionals such as a psychiatrist, a psychologist, a social worker, some type of a counselor, or therapist. Some clients will need a combination of these professionals and yet others will need specially trained professionals to help their children.

PREPARING YOUR CLIENT FOR THE DOMESTIC VIOLENCE TRIAL

Whether you represent the alleged domestic abuser or the alleged victims most the cases are resolved by a trial. Mediation and other forms of alternative dispute resolution are usually not available in domestic violence cases. In many jurisdictions the courts and their staff are prohibited from encouraging or exploring settlement of these matters.

General Considerations in Preparing Your Client to Testify at Trial

While testimony of the incident or incidents of domestic violence is important to your case, it is also important to prepare your client to testify on other matters. The client's credibility is always in issue. Discrepancies about seemingly trivial matters may mushroom into significant questions of credibility which can affect all of the client's testimony. Prepare your client to testify about financial issues and relationships with potential third party witnesses. Showing bias is the easiest way to discredit a witness. Conversely,

admitting "damaging" information upfront can bolster credibility and minimize the impact of "bad facts."

Your Client's Direct and Cross Testimony

For many, testifying on the witness stand will be a new foreign and uncomfortable experience. At least one day prior to the trial meet with your client and prepare them to testify in court. Advise your client about giving *direct* testimony:

- Testify in a slow and deliberate manner.
- Give specifics. Details tend to make witness more credible.
- Do not leave anything out.
- Do not assume the court has read the complaint.
- Practice testimony the night before trial.
- Emotion is permissible as long as it is not contrived.
- Do not continue with an answer if there is an objection.

Advise the client about testifying on *cross-examination*:

- Listen to the question.
- Answer only what is asked.
- Every lawyer has his or her own cross-examination style.
- Remain calm and focused at all times.
- A hard cross is designed to intimidate the witness into losing his or her cool and focus.
- A soft cross is designed to befriend the witness and lower their guard.
- Do not guess and avoid estimating.
- Ask if you do not understand the question.
- Do not continue with an answer if there is an objection.

CONCLUSION

This article provides just a guide to preparing for the domestic violence trial. Every domestic violence case is different and these cases are very fact sensitive. A good advocate knows how to apply persuasive trial techniques to the facts of the individual case.

Copyright of American Journal of Family Law is the property of Aspen Publishers Inc. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.