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PERSPECTIVE

Strategic decisions to minimize risks in domestic violence actions

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Domestic violence actions are commonly referred to as “high stakes,” litigation. All too often, as attorneys we are faced with a client who unknowingly embarks upon one of the most arduous and emotionally challenging courses yet. For those “Game of Thrones” fans, think the Battle of Winterfell — the longest consecutive battle scene in movie and television history. With so many considerations at play, of paramount importance is ensuring the time is taken to engage in detailed strategic decisions to minimize risks in a case of unpredictability.

A finding of abuse in a civil action requires a showing by a preponderance of the evidence — *the lowest legal standard in our court system*. Given how broadly the act of domestic violence has been defined in a civil context, many believe it acts as a catalyst for the increasing weaponization of abuse allegations. Yet, clients often decide — out of necessity or desire — to move forward in pursuing or defending against a domestic violence action. Given the significant impact on a party, children and overall landscape of a family law proceeding, it is crucial to decide how to most effectively advocate to assist the client. This requires a methodical and strategic analysis based upon whether you are representing the alleged victim, alleged perpetrator, or both the alleged victim and perpetrator (mutual restraining orders).

Generally, if representing the alleged victim, the first step is to obtain a temporary restraining order on an ex parte basis (with or without notice), the purpose of which is to protect from a potentially imminent threat of abuse. Whether, a TRO is

issued or not, a hearing will be set within 21 days (or 25 days upon a showing of good cause), leaving relatively minimal time to prepare.

Since most acts of domestic violence occur in private with only two witnesses — the accused and the accuser — absent physical evidence of injury, the outcome often turns on the parties’ relative credibility. It becomes a “she said, he said” situation. While the Domestic Violence Prevention Act does not specifically provide for discovery, general principles of due process and parity provide the authority.

Alleged acts of abuse can be established through testimonial and documentary evidence that may include communications such as text messages/emails between the parties, photographs of injuries, medical records and police reports (provided a foundation is laid), prior restraining orders, a personal diary or calendar which document the alleged abuse as it happened. The use of demonstrative evidence can often be critical in winning the credibility battle. Use and display of audio/video recordings even if surreptitiously obtained can be persuasive and may be authorized by the Penal Code.

Consider whether to take the alleged perpetrator’s deposition even if a continuance is required. Doing so may provide insight into how the alleged perpetrator intends to respond. Establishing inconsistencies about trivial matters can greatly impact overall credibility. Identify unbiased/neutral lay witnesses who personally observed the alleged incident(s) or have personal knowledge regarding the parties’ relationship. Pre-trial interviews help to ascertain strengths and/or weaknesses in their anticipated testimony; only as a last resort, should witnesses be subpoenaed without first having interviewed them.

Consider retaining an expert who specializes in domestic violence to testify at the hearing. The effectiveness is greatly impacted by whether the judge is well versed in domestic violence as the expert is not permitted to provide case-specific testimony per *People v. Sanchez* and its progeny. The standard is whether the testimony will rationally assist or disabuse the judge of certain misconceptions concerning domestic violence. Thus, it will either be persuasive or viewed as more time consuming than probative.

If representing the alleged perpetrator, consider seeking a continuance by waiving the right to a hearing within the statutory time to allow for more time to build a defense, including taking depositions and identifying witnesses. However, this decision should be weighed against the impact on a child/parent relationship if custodial time has been restricted by a TRO.

Consider whether it is more strategically advantageous to forewarn of defenses prior to the hearing by preparing a written response, but failure to do so will not preclude the ability to present such evidence at the time of hearing. If the alleged victim engaged in abusive conduct, consider filing a separate request for a Domestic Violence Restraining Order to obtain mutual restraining orders, which cannot be granted without a separate application and the court’s subsequent finding that “both parties acted as a primary aggressor and that neither party acted primarily in self-defense.” Family Code Section 6305(a)(2).

Often, you can undermine credibility by reviewing the alleged victim’s declarations, police report, social media, and/or witness statements for inconsistencies. An alleged victim claiming to be afraid for her/his life, harassed or had their

peace disturbed may reveal inconsistent conduct, tone and/or statements in these prior communications and/or in social media postings in or around the time of the alleged abuse.

A daunting decision for a client may be calling a child to testify. Every person, irrespective of age, is qualified to be a witness; however, for a child to testify, the child must have the capacity to observe, remember, or narrate what they observed; and commit (promise) to tell the truth. Weigh the overall impact of including the child in litigation, having to testify in favor of one parent over the other, and whether, based on the allegations presented, this will be favorably viewed especially given the court’s predilections not to have a child testify.

The above strategic decisions are often made under hasty, emotionally charged circumstances. Since no roadmap for success exists, a strategic and carefully considered plan will provide a greater level of preparedness and offer a client more sense of security while navigating through these extremely trying (and unpredictable) times. ■

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