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The Importance of Domestic Violence Sensitive Language

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Abstract

It is important for judges to accurately convey what they intend to when speaking to litigants involved in domestic violence. Language has idiosyncratic meaning to perpetrators and to victims. Therefore, it is imperative that judges know and understand the language of domestic violence and to use it properly. This editorial comments on some of the pitfalls of improper use of language, its impact and suggests some solutions.

Key words: domestic violence, language, sensitive, risk, children, power, control

The Importance of Domestic Violence Sensitive Language

What a court says to a litigant during custody/visitation litigation has a significant impact on the litigant and on the course of litigation. The most natural language for a judge to use stems from the Constitution of the United States, as the right to parents one's children derives from the court-interpreted rights of the Fourth Amendment to the Constitution and is secured by the 14th Amendment's guarantee of equal protection under the law. However, language that may on its face appear to express equal rights and equal protection under the law may actually be communicating the opposite, and setting the stage for the perpetrator of domestic violence to feel emboldened by the court. Paradoxically, such language creates a sense of disempowerment to victims of domestic violence. Thus, to guarantee equal protection requires a special sensitivity to the impact of language on these parties in court.

The nuances of the words utilized have significant impact on both victims and perpetrators. It is important for the court and others in court to use language that will communicate accurately to both victim and perpetrator. To properly understand the impact, it is helpful to have an overview of the setting in which the language gets used, as well as the process that takes place.

Picture the scenario where the parties have separated as a result of domestic violence.¹ The wife has been granted a restraining order where, after an evidentiary hearing, a judge has made a finding that there has been domestic violence and the husband has been removed from the marital residence. The husband has been the primary financial support for the family. The wife has had the responsibility for the day-to-day care of the children. While she has held a job, she earns far less than the husband, and thus is dependent upon the husband for most of the family support. The wife still lives in the marital residence using her salary as well as the support

she gets from her husband and is responsible to pay bills. Because she earned far less than her husband during the marriage, the wife has had virtually all the responsibility to handle children's extracurricular activities, doctors and dentist and orthodontia appointments, as well as making social arrangements for the children, transporting the children to and from school, and helping with homework.

Once parties are in court, there is an expectation that both parents should set aside their differences for the welfare of the children; thus, phrases from the judge like "these two parents need to learn how to get along here" are common. When the perpetrator hears that phrase, it is a clear message that the court does not understand the power he has over his wife. Thus, he feels empowered and emboldened. The words may actually encourage abuse of his power over his wife through the litigation of custody or control over finances. For certain, he knows how to gain control because he knows his wife's fears. In addition, he knows whether he has used the threat of taking custody of their children, as domestic violence perpetrators often do to maintain control of their wives during the marriage.

To the domestic violence victim, those same words from the judge's lips tell her that the court does not understand that the victim's husband cannot negotiate. His way is to demand compliance and capitulation, through the use of intimidation, violence, and/or threats. She knows that the only way to gain equality is for the court to have an understanding of her husband and to use the court's power to secure her equality. Thus, the victim is fearful and a sense of helplessness is heightened. She knows she may be at risk of more violence (Fox & Zawitz, 1999). She must be hyper-vigilant.

The victim sees the court as having the power over her husband that she did not have. Before coming to court, she anticipates that the court will use its authority to protect her.

Domestic violence-sensitive language can assure that both parents receive equal protection. The court can use its power to let the perpetrator and the victim know the long-term impact of violence in the home, and can speak directly to this issue. For example, a judge can state, “I hope you understand the importance of not trying to use the court to control your wife, as I will not tolerate it. The children need to be assured of that protection to the full extent of the law. The children may not have seen your violence to your wife, but they are victims of it nevertheless. Surely, your wife behaved differently than she would have had she not feared that you would continue to hurt her. If nothing else, the children are aware of that. They are entitled to two parents who are free from violence. I intend to...”

That same judge can look to the domestic violence victim and state, “While I am aware of your husband’s ability to control you or to try to use the court, it is also important for you to understand my role is to allow the children to have the best relationship they can with both of you. To that end, I ask you to try to overcome your fears in the presence of the children and for you to try to assist in the relationship with their father.”

Such oratory recognizes the perpetrator’s power and ability to control while still acknowledging the domestic violence victim’s difficulty to encourage a positive relationship with their father. In fact, to do so may not be a natural response for the domestic violence victim. It also creates a new power structure for both parents, so that the victim can come back to court for assistance when she needs it. In addition, the husband-perpetrator knows the court has and will use its power to continue to protect his abused wife.

Many states require parents to try to negotiate visitation schedules even where there has been a finding of domestic violence. In that circumstance, it is imperative that a court communicate correctly and can tell both parents, “The children have already been hurt by being

raised in a home where one parent fears violence. I will use my power to keep that from happening again, and to keep coercive parenting from being perpetrated on the children. This state takes seriously its obligation to protect children from emotional harm as well. Witnessing or experiencing verbal abuse, name-calling, or put-downs of the mother or the children will cause harm to the children, and this court will not permit that to occur. I am not encouraging negotiation, but I want this mother to know that the court is a friendly place to victims and I want this father to know that his parental rights do not give him the right to hurt their mother or create fear.”

The message to the victim is, “If you are fearful or there are threats or you believe the children are at risk, I encourage you to tell your lawyer and to get assistance from this court.” The same statement tells the perpetrator, “As already stated, you will see your children and hopefully behave appropriately. But I will immediately stop contact until you learn to do so if I find out that berating or name-calling or threats are continuing.”

Another common problem occurs during litigation over sole custody, as many states strongly encourage joint custody and joint decision-making. It is illogical to believe that someone who has used coercion and threats as a manner of control will simply stop this behavior voluntarily. Nevertheless, courts all too frequently lose sight of this piece of human nature as it becomes impossible to negotiate with the husband-perpetrator. I have heard countless judges comment almost offhandedly with phrases such as, “If this woman wants to spend all the marital funds to litigate...” Each time I hear this I cringe. I have recognized that this little phrase translates into a lack of consideration for a victim’s inability to negotiate with her abuser. Such words also signify a failure to recognize the impact of domestic violence on children.

Judges need to be particularly sensitive to the things they say, as they may open the door for the perpetrator to repeat a phrase that was once used by the court any time the victim returns to court to seek relief. This same type of phrase is a put-down to the victim for her attempt to secure her children's best interests. In fact, under the Constitution parents are required to protect their children from harm. There is no qualification, for example, that the children will only be protected from strangers. If a parent truly believes the children need protection from a parent, or if the one parent uses the children as a sword against the other, sole custody and decision-making may be the required and desired custody order for that family. But when the victim who seeks sole custody in this circumstance hears a put-down by the court, the victim feels pressure to capitulate in order to avoid provoking the court's ire. This even when she truly believes sole custody is important. In fact, spending to protect children is a legitimate expenditure of marital funds. So when a judge makes negative comments about tapping those funds, it feels as if the judge is making a legally unfounded assertion that it is not legitimate to spend marital funds in this way.

Domestic violence-sensitive language requires an understanding of the need for a domestic violence victim to have financial independence in order to remove the perpetrator's control. It also requires the use of the court's contempt powers to assure the perpetrator's compliance with judicial orders that are issued because the court must be steadfast in its support for the victim. The abuser may disagree, but the court is required to enter orders regarding support and visitation that recognize that it is legitimate to expend a large amount of money to protect children.

The impact of language also is felt in how society views the separate parental roles of mothers and fathers. Fathers who seek custody are seen somehow as 'noble' or 'romantic' in

trying to co-parent because society still seems to give extra value to a father who wants to spend time parenting. On the other hand, a woman is expected to want to parent. She receives no special recognition; it is her duty to parent.

Domestic violence-sensitive language would give a woman proper credit for the historically female job of raising the children and the difficult tasks ahead. In addition, such language would pierce any romantic notion about a father seeking to parent and look to the father's actual participation as a parent prior to the marital break down. Domestic violence-sensitive requires the recognition that the perpetrator is suspect for wanting a change in amount of time and responsibility from the level of participation he had prior to divorce proceeding. Statements such as "We should be happy he wants to spend time with the kids" or "Aren't the kids lucky to have a father willing to spend more time with them?" should not go unscrutinized.

Sensitivity to both parents and their children requires determining what the status quo was before the marital relationship came to court, because security for children includes ensuring that they experience the least amount of disruption to their lives. This would likely mean keeping them in the same school, same home, the ability to maintain friendships, and to have a similar time with each parent so long as it is in a safe environment. A romantic view of father's active parenting is not appropriate where there is domestic violence. Language used by the court or experts that does not recognize the inequality of power and control between victim and the perpetrator is not domestic violence-sensitive.

Frequently, issues of estrangement and accusations of alienation are rendered in court. Where an accusation arises in the context of a domestic violence history, it is particularly important for the court to be sensitive to language. The starting point? The judge should question the parent who is alleging alienation or estrangement about the familial arrangement for

childcare prior to the breakdown of the marriage. If the mother was the children's primary caregiver throughout the marital relationship and there was domestic violence, it seems appropriate for the victim to feel angry or outraged if a previously uninvolved father suddenly wants total or shared custody.

Often, courts draw a negative inference if an alleged victim has never called the police about violence. Similarly, the court should ask a perpetrator, "Why now?" if he is seeking to spend more time with children. It is appropriate to suspect his motivation where there is a sudden shift. It must be considered as a part of a power and control issue. Where children are thriving with the status quo of mom being primary custodian, a court needs to recognize that if the children are suddenly with perpetrator at times when they were not with him during marriage, it might be pleasant for them but it is not the status quo.

Frequently, courts view as negative a victim's appropriate anger at being victimized, instead of accepting anger as natural consequence. The court should not use any punishment, reprisal, or angry language with a victim who is angry as a result of being a victim. Instead, sensitivity to her status as a victim includes determining whether she has a reasonable basis for her anger. Were a stranger to be victimized, anger would be appropriate. If so, this same standard should be applied to victims of domestic violence. Use of sensitive language requires thinking outside the realm of family court and an analysis similar to the stranger/perpetrator/victim model. For example, in criminal law we take victim impact statements and victims participate in plea negotiations because the victims' anger is accepted and understood as appropriate. In this way, the need to protect the child from the abuser would be clear to anyone who hears the facts. Likewise, in entering visitation orders, the court should use the same analogy involving violence

to a stranger in considering a child's reaction to a person they know to be capable of violence.

Again, the need to protect the child would become obvious

Frequently, I have heard what I refer to as *manipulative anger* from the perpetrator. It is spoken in a manner designed to show that he is incredulous and indignant. I am then reminded of the case where a child was abused in the attic of the family home. When the alleged perpetrator was asked about this, he denied ever going to the attic. If there was no abuse, why not state instead that he would never abuse a child? The nuances of such responses are important if courts are to be domestic violence-sensitive.

Sometimes people do not understand why criminal charges are not brought where there has been violence to children. There is an assumption that criminal charges are not brought because the violence was not serious, but there are other more likely explanations. There is a difference between criminal and civil standards of proof. In addition, I have never met a woman victim who wants to put the father of her children in jail. A prosecutor has the discretion to decide not to bring charges. If a woman does not press charges, a prosecutor's decision not to file criminal charges is understandable.

Even where a judge is sensitive, there is the much-overlooked factor of judges handling as many as a thousand cases a year; there is little time for each case. In addition, while court orders are designed for finality, a family's needs are in flux, creating a dynamic between the court and the family that is inconsonant.

I have seen many changes in the area of domestic violence during my legal career. The importance of judicial sensitivity in the use of language in family court should not be underestimated.

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Footnote

¹ While domestic violence is not gender specific, it is gender predominant against females and children (as well as the elderly). Thus, this column will refer to the male as perpetrator and the female as victim.