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AVOIDING THE WITNESS CRASH-AND-BURN SYNDROME

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How often have we read and glossed over the Appellate Division pronouncement: "the trial court's determination was based upon its evaluation of the parties' credibility and will not be overturned on appeal" [FN1] accepting the seemingly inevitable?

When hotly contested matrimonial cases do not settle and proceed to trial, witness testimony and demeanor -- from which witness credibility derives -- often prove to be crucial determining factors. [FN2] Matrimonial practitioners are singularly dependent upon the trial court's favorable assessment/evaluation of the credibility, character, temperament, intelligence, bias and sincerity of their client to achieve a favorable result. [FN3] Yet it is curious that witness preparation seldom is afforded the attention it so desperately deserves.

Certainly, no matrimonial practitioner wants to lose -- and no matrimonial litigant will intentionally try to be defeated. The matrimonial practitioner may work for days straight preparing the case for trial, reviewing each pleading, motion, financial document, and preparing expert and non-party witnesses, but excluding the client until the very last moment. The matrimonial practitioner, often relying on the efforts of associates or even paralegals to do the major preparation of the case for trial, will relegate a few brief hours to superficially survey the case with the client, then pat him on the head and send him out the door.

The moment inevitably arrives when the client commences testimony, and disaster strikes.

The outcome may take the form of confusing, contradictory or pedantic testimony; [FN4] "skeletons in the closet" that no one uncovered during pretrial preparation; [FN5] documents never before seen by counsel; unrelenting (thus suspect) nervousness; a damaging, but unnecessary admission; inflexible rigidity; argumentative manner during cross-examination or even the client's own simply disagreeable personality. [FN6] Whatever and wherever the failing, whether at deposition or trial, the witness has lost credibility and thus seriously hampered his persuasiveness. Adroit legal maneuvers, wily strategies, powerful pretrial memorandum and dramatic post-trial briefs are of little account if the witness has indelibly sullied the stream of truth.

Emotional and Explosive Nature

Prepare yourself, then prepare your client. As was touched upon in the seminal case of Blickstein v. Blickstein, 99 AD2d 287, 472 N.Y.S.2d 110 (2d Dept. 1984), a broader spectrum of human behavior is anticipated from parties to a matrimonial action by virtue of the emotional and explosive nature of such litigation and the dynamics underlying it. [FN7] As Justice David B. Saxe quite eloquently noted in Gordon v. Gordon, NYLJ, March 10, 1992, p. 22, col. 5 (Sup. Ct. New York Co.), "Behavior which would be aberrant in any other litigation is normal in this context."

The upshot of all this is that prior to the commencement of depositions the matrimonial practitioner must have "complete knowledge." Plans must be laid; goals must be defined. There must be a mastery of the law, the facts, the theories of relief, the details, the documents, the case deficiencies, the motives, the psyches at work and the manner in which all these things mesh or fail to. [FN8] The matrimonial client's deposition does not take place in a vacuum. It is the essential underpinning from which all other testimony will flow.

'Complete knowledge' requires that the matrimonial practitioner must simultaneously be Svengali, advocate, psychiatrist, nanny, drill sergeant and gatekeeper. And the attorney must do all this while representing the client zealously, within the bounds of the law, and so as to preserve the truth. [FN9]

'Complete knowledge' having been achieved, the client must now be provided with a conceptual understanding of the objectives of their testimony. [FN10] In order to do so, however, the client's ability to participate fully in the plan must be assessed.

Typically, there are two kinds of witnesses in matrimonial practice -- the "Master of the Universe" and the "Victim."

The Master of the Universe can take many forms. Male or female, it matters not. They are doctors, lawyers, teachers, CEOs and other types of senior executives -- or those who aspire thereto. They are the absolute rulers of their own kingdoms (or simply think they are). They are accustomed to setting their own agendas and priorities, and seldom permit themselves to be second-guessed, especially concerning the manner in which they communicate their needs, wants and goals to others. [FN11] They often refuse to commit the time necessary to properly prepare for their depositions and often refuse to restructure their way of thinking or responding to questions so as to limit the damage that their spouses' attorneys or their own answers will inflict. Caution must be taken with the Master of the Universe, for although professing complete and total understanding of the plan of attack, and commitment to total, and thorough preparation, he is filled with negative dynamics. He has a tendency to turn off during preparation, often filtering out or ignoring valuable advice, substituting his own schema for yours. [FN12]

The Victim, just like the Master of the Universe, can be either male or female. The Victim cons the matrimonial practitioner into doing all of the work. He or she appears helpless, confused, forgetful, angry or frustrated. [FN13] He says things like, "I don't know how I can possibly get through this," or "What if I forget what I am supposed to say?" [FN14] The Victim will do everything and anything to avoid responsibility for his own actions and performance while espousing the desire to perform perfectly. [FN15]

The simple cure for the "Master" and the "Victim" is unrelenting, unmitigated, unapologetic practice, practice, and more practice. Do not accept "No" for an answer. The client must be exposed and meticulously coached in all important areas of testimony. The matrimonial practitioner must review with him all the potential traps and pitfalls. Whether it is called teaching, cajoling, begging or "wood shedding" the aim is to encourage a better performance. [FN16] By doing so the client is put in charge of his testimony. The "Master of the Universe" will thrive on the power and control. The "Victim" will grow with the experience of self-determination.

There are reasons even the most highly anticipated, touted and lauded theatrical events undertake weeks and weeks of out-of-town tryouts before opening on Broadway. First, it is important to generate positive "word-of-mouth" to promote confident expectation. Second, there is no substitute for the proper investment of time, attention and preparation in securing a winning performance and ultimately a successful run. One too many missteps, or false notes from the star performer, could mean a very short trip back to the unemployment line.

So too the client's deposition is their "out-of-town" tryout. Time must be spent with the client -- listening to them, observing them and rehearsing them. Ample time must be spent uncovering memory gaps, inconsistencies, improbabilities, embarrassments, weaknesses and flaws, and exploring the best manner in which to deal with the problems as they arise. [FN17] The deposition will test the case and the client; and may likely serve as an arsenal for dispositive motions, hard-hitting settlement talks, and of course, trial. [FN18] Thus, there is no harm in pointedly asking the client: "Tell me all about the skeletons in your closet, so that we can properly prepare."

Witness preparation at both the deposition and trial level must be keyed into helping witnesses offer strong, effective and relevant testimony, mentally organize and have quickly accessible all essential information and/or knowledge. [FN19] They should understand that much of the deposition (as well as cross-examination at trial), is a mind and word game, and that they will lose if their spouse's attorney trips them up. [FN20] In reality, it is the witness who "trips" and the lawyer who exposes the fall from grace.

It is incumbent upon the matrimonial practitioner and inherent in his ethical obligations [FN21] to guide, indeed train the client to present honest testimony, plainly, understandably and credibly. The witness must review everything where he is "down on paper." [FN22] Particularly important areas of documents should be highlighted with the client. Any areas where statements differ must be explored and explained. Discovery responses, in particular, are exceedingly fertile ground for deposition/trial trip-ups, as are the deposition notice and any accompanying document request. Income tax returns, charge and credit card statements, brokerage account and bank account statements are long-time matrimonial practitioner favorites for mischief, creating confusion and anxiety, and chipping away at the client's ability to perform at the deposition. The art of preparing a witness is consistency.

To this end it is imperative that the actual preparation of the matrimonial client for deposition not be left to the last-minute or a junior associate. Only when lead trial counsel personally prepares the witness, knows precisely the manner in which the witness will testify, has a feel for the type of witness he is, and understands how to ultimately ask questions (at trial) that will trigger the appropriate response, can the witness be effectively prepared for deposition and then presented at trial. [FN23]

The Interested Witness

It goes without saying, but has been said very often, that "a court is never bound to credit the statements of an interested witness." Glatter v. Borten, 233 AD2d 166, 649 N.Y.S.2d 677 (1st Dept. 1996). Undeniably, there can be no more of an interested witness than a litigant in a matrimonial action.

The matrimonial practitioner thus starts out with a heavy burden -- a client who is, from the moment he takes the stand, suspect.

How best to overcome that burden rests in exploiting the two main factors that underlie a person's credibility -- expertise and trustworthiness. [FN24]

The trial court expects the party in the matrimonial action to be an expert on the facts of his or her marriage. The witness should present the marital history smoothly, assuredly, in a complete, succinct and organized manner, in plain, polite language. Cool reflection and cool recitation is key. Verbal hedges, disorganization, missing information, combativeness, defensiveness, inconsistent statements and slow speech are to be avoided. Eye contact with the judge is to be encouraged. [FN25]

Trustworthiness is closely related to sincerity, and speaking the truth and making assertions based on valid information. Although it can never be fully offset, there are ways to minimize the perception of the witness as insincere. [FN26] The best way perhaps is to encourage the witness to testify, in part, in a way that runs counter to their position, or best interests. This task should be relatively simple, since there is never one side in a matrimonial action that is always completely right or completely wrong.

Forming an opinion as to credibility is a process; a process of rationalization and reasoning from the information presented in the light of experience. [FN27] It is the essence of the human experience -- truth, lies and the gray matter that lies between.

There are times, however, when the line is so clear, that the failure to properly prepare the matrimonial client is palpable, leaving the reader to scratch his/her head, and wonder aloud "What was the attorney thinking?"

The following cases will serve to illustrate the above.

In the recent unreported decision in the case entitled Amsellem v. Amsellem [FN28] the Hon. Robert A. Ross, justice of the Supreme Court, Nassau County, began his eight-page,

single-spaced observation of the defendant-husband's financial testimony at trial as follows:

My determination of many of the issues herein, depended to a great extent upon my assessment of the credibility of the witnesses. During the trial, I had an opportunity to see, hear, and assess the testimony of the plaintiff and the defendant [cite omitted].

* * * * *

On almost every issue in this case, the record herein demonstrates a lumbering and wholly unveracious testimony on the part of the defendant....

* * * * *

His testimony was often unresponsive, self-serving and as it related to the finances, it was simply vacuous and incredible ...

* * * * *

The defendant's murky and confusing financial scenario, with attendant invoking of Fifth Amendment rights against self-incrimination, however contrived, is simply not feasible -- the defendant has presented utterly insufficient and wholly contradictory evidence for this Court to determine his actual gross income.

Other financial testimony foibles can be found in Costello v. Costello, 757 N.Y.S.2d 588 (2d Dept. 2003), Slip Op. 12825; where the trial court did not find credible the defendant's testimony regarding his inability to access the documentation necessary to prepare the parties' joint 1993 income tax return (where he alone earned virtually 100 percent of the parties' income), and Jenkins v. Jenkins, 181 Misc.2d 1, 691 N.Y.S.2d 724 (Sup. Ct. 1999) where the documentary evidence and credible testimony revealed that the husband's diminishing income and financial reversals (dropping from a net worth of in excess of \$4.5 million to approximately \$1.6 million) were both exaggerated and self-created.

In Maillard v. Maillard, 243 A.D.2d 448, 663 N.Y.S.2d 67 (2d Dept. 1997), and Perkins v. Perkins, 641 N.Y.S.2d 396, 226 A.D.2d 610 (2d Dept. 1996), the parties' deposition testimony proved to be their undoing upon reaching trial.

In Maillard, Ms. Maillard claimed to have no financial interest whatsoever in a videotape business she had created and worked in. At her deposition she refused to answer questions concerning the business. After being instructed to answer, Ms. Maillard alleged a total inability to recollect anything she ever did regarding the business. The appellate court found Ms. Maillard's testimony to be "patently incredible," and precluded her from offering any evidence at trial on the issue of her income or expenses relative to the videotape business.

In Perkins, Mr. Perkins was estopped at his divorce trial from claiming an interest in certain real property by his unqualified and unequivocal deposition testimony that his wife had purchased the premises in issue with her own assets and was at all times the sole owner. Perkins is of particular interest, because the inconsistent deposition testimony had not been given in this action, but had previously been given in an action commenced by a third-party creditor against Mr. Perkins.

And, in *Reed v. Reed*, N.Y.L.J., Dec. 6, 2002, p. 29, col. 5, the failure of the father to be calm and controlled played a major part in the trial court's finding that the child's best interests were best secured by the mother remaining as the primary caregiver:

It must be made clear though that this is an independent decision after having observed the demeanor of the parties, listened to hours of testimony of these parties and assessing the relative strengths and weaknesses of the parties and their credibility. See *Koslowski v. Koslowski*, 2002 N.Y. Slip. Op. 06735, 747 N.Y.S.2d 583 (2d Dept. 2002); See also, *Furman v. Furman*, 2002 WL 31319284, 748 N.Y.S.2d 190 (3d Dept. 2002); *Bates v. Bates*, 290 A.D.2d 732, 736 N.Y.S.2d 488 (3d Dept. 2002). The plaintiff testified credibly, providing insight and planning for the child. The defendant's testimony lacked credibility and was result oriented without any real plan for the future or ability to provide a stable day-to-day environment for the child. The plaintiff's testimony leads this Court to believe that she is both caring and conciliatory and has the child's best interests at heart. The defendant's testimony was overly combative, defensive and demonstrated to the court that his parenting abilities were lacking.

In the end, in each of these cases, the final result might at least have been tempered with proper planning and preparation of the witness so as to avoid what became the inevitable.

Conclusion

Tenacious, painstaking and comprehensive witness preparation is crucial to victory in matrimonial litigation. The labor intensive efforts of the matrimonial practitioner and the client are the prerequisites to producing a more credible witness, less prone to missteps and foibles that can detract from decisive testimony and play havoc with the court's perception.

FN1. *Zabehanskaya v. Dinhoff*, 274 A.D.2d 476, 710 N.Y.S.2d 639 (2d Dept., 2000); *Delliveneri v. Delliveneri*, 274 A.D.2d 798, 710 N.Y.S.2d 737 (3d Dept., 2000); *Patek v. Patek*, 239 A.D.2d 327, 657 N.Y.S.2d 738 (2d Dept., 1997); *Hoffman v. Hoffman*, 68 A.D.2d 806, 413 N.Y.S.2d 719 (1st Dept. 1979).

FN2. Amy Singer, Ph.D., "Witness Preparation - Intellectual Property Cases.," Singer Litigation Library, Trial Consultants, Inc., Fort Lauderdale, Fla.

FN3. *Patek v. Patek*, supra.

FN4. Amy Singer, Ph.D., "Witness Preparation," supra.

FN5. Id.

FN6. Id.

FN7. *Gordon v. Gordon*, N.Y.L.J., 3/10/92, p.22, col.5 (Sup. Ct. New York Co.).

FN8. Stuart M. Israel, "Preparing Your Client for Deposition," presented at "The Art of Witness Preparation: Everything You Need to Know to Prepare Your Witness for Deposition," Nov. 3, 2000, Institute for Continuing Legal Education, Michigan.

FN9. EC 7; DR 7-101; DR 7-102.

FN10. Susan E. Jones, Ph.D., "Psychology in Litigation: How To Prepare Expert and Lay Witnesses," Jury Research Institute.

FN11. Amy Singer, Ph.D., "Witness Preparation," supra.

FN12. Id.

FN13. David S. Davis, Ph.D., "Witness Credibility: How Important Is It?" The DQ Library: DecisionQuest Articles, DecisionQuest Online.

FN14. Id.

FN15. Id.
FN16. Stuart M. Israel, "Preparing Your Client for Deposition," supra.
FN17. Id.
FN18. Id.
FN19. Amy Singer, Ph.D., "Professionally Prepared for Witness Preparations?" Singer Litigation Library.
FN20. Id.
FN21. Stuart M. Israel, "Preparing Your Client for Deposition," supra.
FN22. Thomas A. Mauet, "Fundamentals of Trial Techniques," Little, Brown and Company, Third Edition, 1992.
FN23. Id.
FN24. David S. Davis, Ph.D., "Witness Credibility: How Important Is It?" The DQ Library: DecisionQuest Articles, DecisionQuest Online.
FN25. Id.
FN26. Id.
FN27. Quinones v. Quinones, 139 N.Y.2d 607, 611 (Sup.Ct. New York Co. 1955)
FN28. The author's firm represented Ms. Amsellem in this action prior to the author joining it.

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