



Connection

UNIVERSITY OF BALTIMORE SCHOOL OF LAW ■ CENTER FOR FAMILIES, CHILDREN AND THE COURTS

Promising Practices in Family Law Cases Help Ease Impact of Divorce

BY JUDGE J. STEPHEN SCHUSTER

The groom stares longingly at his bride. The bride holds back a tear. They just delivered their vows “till death do us part” in front of their closest family and friends. As they dance to Ella Fitzgerald’s “At Last,” they realize their lonely days are over.

Divorce is the farthest thought from their minds. If the unexpected happens (even though statistically it should not be unexpected) and divorce occurs, the courtroom often turns into a battlefield. Divorce becomes unnecessarily adversarial and will have a long-term impact on all the parties involved. The following are a few “best practices” to make divorce easier on the children and the participants.

Divorce Practices Must Aim to Protect the Children

BY JENNY SCHULZ

The goal for most parents in a custody case is to win, which generally means being awarded all or most of the relief requested at trial. For children, the concepts of winning and losing are irrelevant. No child wins in a divorce. Kids’ wishes for their parents to stop fighting often eclipse their desires regarding the care schedule. Time and again, children say: “I want my mom and dad to get along.”

Children’s representatives, therefore, do best by setting goals that aim at encouraging family stability, rather than “winning.” In every case, children’s attorneys should have, at a minimum, these four goals:

- **Lessen the conflict to which children are exposed,**
- **Strengthen family relationships,**
- **Connect families to needed services, and**
- **Allow children’s voices to be heard.**

LESSEN THE CONFLICT

Parents, embroiled in their own emotions, often are unaware that their children are witnessing the conflicts. Children’s attorneys should ask clients about times that parents have contact with each other in the presence of the children: phone calls, exchanges, medical appointments, school, and extracurricular activities. Mediation and hearings present an opportunity for attorneys to observe the conflict between parents

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Divorce is similar to a death, just not as final. It is the end of certain traditions, fantasies and hopes. Grieving is a necessary part of the healing process.

MAKE THE DIVORCE HAPPEN QUICKLY

It only takes one person to want a divorce. If a party makes this decision, and counseling is not an option, move it forward quickly. The couple physically should be apart as soon as possible. The longer the parties

live together, the more opportunities there are for increasing depression, resentment and, unfortunately, violence.

ALLOW YOUR CLIENT TO GRIEVE

The divorce is similar to a death, just not as final, often involving flashbacks. Divorce is the end of certain traditions, fantasies, and hopes. Expect everyone involved to go through the stages of grief. Do your best to help your party through this stage.

CUT DOWN VOLATILE INTERACTIONS BETWEEN PARTIES

Do not allow your client to talk to his or her spouse, especially in front of the children. The emotions are raw, minimizing any positive effects of “face-time.” No good will come of an interaction that pushes the other party into a corner. Every battle fought hurts the children. The client’s communication skills probably were not very good before the divorce, and communication likely will become even more strained as the divorce proceeds. It is better to instruct your client to communicate by e-mail. Parties should be reminded that e-mails are permanent and can be used in a court proceeding. This gives the party time to shape his or her end of the conversation with less emotion.

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Family Law Practitioners Discuss Ways to Minimize Harmful Effects of Divorce

For many, divorce has become a stark reality in their lives. They begin their marriages with the best intentions, but often end them with the worst of intentions as divorce wreaks havoc on their lives and the lives of their children. Their emotional traumas frequently end up in courtroom battles.

The American Bar Association Section of Family Law devoted a plenary session at its 2011 Continuing Legal Education Conference last October to a discussion of ways to minimize the destructive impact of the legal process on family members and maximize the family members' positive interactions with each other during the case and after the case concludes.

The plenary, "Promising Practices in Family Law Cases," was moderated by Professor Barbara Babb and brought together family law practitioners and experts to discuss the most promising practices in the various areas that a family law attorney will encounter in a case.

Several of them have written articles for this issue.

- **Georgia Superior Court Judge J. Stephen Schuster** offers a judicial perspective on how couples can get through a divorce with less emotional fallout for themselves and their children.
- **Jenny Schultz**, who heads a nonprofit providing legal representation for children in high conflict divorce and custody cases, discusses divorce practices aimed at protecting the children.
- **Carlton D. Stansbury**, a Wisconsin family law attorney, writes about creative uses of alternative dispute resolution techniques in family law litigation.
- **Rick DeMichele**, a New Jersey family law attorney, discusses domestic violence cases and ways to minimize the impact on the children. ■

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Creative Uses of Alternative Dispute Resolution Techniques in Family Law Litigation Produce Better Outcomes

BY CARLTON D. STANSBURY

The unavoidable reality of divorce cases is that their resolution is squarely within the litigation process. In most jurisdictions, a divorce is an actual lawsuit in which one partner of an intimate partnership sues the other partner for divorce, custody, property division, and support. The system that determines the damages from the breach of a contract between a corporation and a vendor is the same system that dissolves a family relationship.

We know from centuries of experience that the traditional litigation model is not the answer to the vast majority of divorcing families. We know that family law clients who litigate their cases are rarely, if ever, satisfied with the process or the result. There is not a direct correlation between the time and money invested in litigation and the results obtained. In fact, most family law clients do not want to go to trial.

We need to make changes in how we "litigate" a case to meet the needs of the market and remain a viable part of the family law system. The consequences of changing include an immeasurable increase in satisfaction by both parties and lawyers, better outcomes that are reasonable under the circumstances, and a result that provides something to the party that he or she could not achieve at trial.

If we cannot change the fact that divorce falls within the litigation model, how do we alter the way we "litigate?" The best way to make change is to borrow transferrable elements from other dispute resolution processes and bring them into the litigation process.

USE MENTAL HEALTH PROFESSIONALS

Mental health professionals typically are involved in family law cases as therapists or evaluators. The collaborative law movement has recognized the value the mental health community can provide to a divorcing family and has expanded the role of mental health professionals.

Child Specialist/Parenting Consultant: Rather than hiring an "evaluator," try working out an agreement with counsel to retain a mental health professional to help the parties reach their own arrangement for the child. The child specialist/consultant talks to the parties individually and together, talks to the child, and then meets again with the parents. The child specialist also could talk to collateral sources, such as other parents, teachers, and doctors. Rather than giving a "recommendation" or imposing a particular placement schedule, the child specialist would provide feedback to the parents about the child's perspective and individual needs, how the child is doing, the child's strengths and weaknesses, and the perspective of others. The child specialist works with the parties to draft a parenting plan that accommodates the information gathered and other information on the child's developmental needs as it relates to a particular placement schedule and family. Furthermore, the child specialist helps educate the parents so that the parents avoid making decisions based upon assumptions or myths about children.

Divorce Coach: One of the frustrations of family lawyers is dealing with the client's emotional issues during the divorce process. A client's therapist is not always helpful because his or her role is to work on specific mental health

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firsthand. Equipped with this information, attorneys should suggest creative ways to reduce conflict.

STRENGTHEN FAMILY RELATIONSHIPS

Children's attorneys can be instrumental in improving communication between parents and in building more positive family relationships. They should first seek to understand the parties' communication patterns and then craft a plan that ensures the most direct and positive communication possible. Children's attorneys also should make themselves available by phone after hours, when disputes often arise and parents' attorneys are unavailable.

In high-conflict cases, it is not unusual for children to take sides and refuse to spend time with one parent. A child's attorney is in a pivotal position to encourage mending relationships, particularly between parent and child. Though not every relationship can be restored, much care and effort should be given before accepting the status quo.

CONNECT FAMILIES TO NEEDED SERVICES

In high-conflict cases where substance abuse, domestic violence, and mental illness are common, the intervention of an outside professional often is needed. Unaddressed issues are a barrier to reducing conflict and strengthening family relationships. It is the responsibility of the child's attorney to identify when services are needed, refer families to quality providers, request court-ordered compliance, if necessary, and collaborate with the service provider to ensure that the services are helping. Services go beyond counseling and anger management and might include, for example, debt counseling, treatment for alcoholism/addiction, and educational support.

ALLOW THE CHILD'S VOICE TO BE HEARD

The child will be more impacted by the care schedule than anyone else in the family and must be given the opportunity to be heard. When children's wishes are a factor in proceedings, the attorney should let children determine whether they ultimately wish to testify. Testimony should be taken in the least harmful way—in chambers and without the parents present. Children's attorneys must counsel clients in advance that the outcome of the court's decision is not the children's responsibility. The attorney should prepare clients by touring the courthouse well beforehand and providing information about what to expect when they are in court. Children's attorneys make good use of the court's time by focusing children on relevant issues.

Essential to these four goals is time spent with the child client.

Meetings with the child are at the heart of the representation. In our practice, attorneys spend an average of eight sessions with a child

A child's attorney is in a pivotal position to encourage mending relationships, particularly between parent and child.

(approximately once a month, but initially more often). Patience is needed to obtain a full picture of the family situation. To understand a child's position takes time; one must establish a rapport and gain trust before a child will open up fully.

Qualified children's attorneys know that children in these disputes want to live where they feel safe, nurtured, and stable and will listen for this information in mul-

multiple meetings with clients. A 14-year-old girl who wanted to live with her father initially complained that her mother did not take her to the hair salon of her choice, but later confided that she ate dinner alone, locked in her room every night at her mom's house, and was afraid of her stepfather. If I had assumed I had all the needed information after the first few meetings, I never would have learned these critical facts.

High-conflict custody disputes put children at risk for serious emotional and behavioral problems, educational failure, and substance abuse. To counter the negative impact of family conflict, children's attorneys must set measurable goals to achieve positive outcomes for children and their families. ■



Attorney Jenny Schulz is the founder and executive director of Kids First Law Center, a nonprofit in Cedar Rapids, Iowa, that provides legal representation to children in high-conflict divorce and custody cases.

The Vital Work of CFCC

The Center for Families, Children and the Courts (CFCC), a non-profit organization, offers to Unified Family Courts (UFCs) strategic planning and technical assistance, as well as evaluations of the effectiveness of these courts and their related programs. Other CFCC services include compiling surveys and reports, formulating performance standards and measures, providing training and workshops and organizing conferences for the judicial, legal and court communities. CFCC relies on the support of foundations, grants and partners to fulfill its mission to improve the lives of families and children and the health of communities through family court reform.

Visit <http://law.ubalt.edu/template.cfm?page=1189> for additional information. See also: <http://www.facebook.com/CFCCatUBaltLaw>.

Promising Family Court Practices Ease Impact of Divorce *from pg. 1*

DO NOT LET ONE SPOUSE DENIGRATE THE OTHER IN FRONT OF THE CHILDREN

Children love both parents, but they will grow to hate the person who insults their parent. The child is a product of both parents. If you denigrate the other parent, it is as if you are denigrating your child.

THE COURT IS NOT A BOXING RING—DO NOT USE THE COURT TO BEAT UP THE OPPOSITION

Every “punch” you throw is a punch to the children. They will be the ultimate recipients of the bitterness, hostility and fury that characterize your communication with the opposing party. The client should use you, the attorney, as well as the therapist, friends, and family, as a “sounding board” before they retaliate.

ADVISE THE PARTIES NOT TO VISIT THE OTHER’S HOME

Children tend to think in black and white. They may misinterpret the contact and conclude the divorce is not final. This may create a false hope of reconciliation. Children hold onto the desire and fantasy of reconciliation. Do not allow them to be traumatized one more time.

REQUIRE PARENTS TO TAKE A PARENTING CLASS FOR DIVORCING SPOUSES

Parenting classes raise awareness of parenting issues. These classes should be completed before parents are too far into litigation and before damage already is done to the children.

REQUIRE MENTAL HEALTH PROFESSIONALS TO BE INVOLVED

Although divorce is a legal process, it also largely is an emotional and psychological one. Divorce can result in short- and long-term consequences. Children should meet with a confidential counselor. This counselor should be someone who will not provoke the children or betray them by being a witness in court for one or the other party.

KEEP THE CHILDREN OUT OF THE COURTROOM

Do not subpoena children. Attorneys need to hear from the judges that no children should be brought to the courthouse unless the court wants to hear from them. Do not expect children of divorce to act their age. Because of the extreme emotionality of the issues that children confront when parents divorce, their ability to think logically is diminished. Therefore, expect them to react emotionally, rather than rationally.

RECOGNIZE THE CONTRIBUTION OF A GUARDIAN AD LITEM

Let the guardian do her job. The guardian can be the most important outsider in the case.

APPRECIATE CREATIVITY AND ALTERNATIVES IN PARENTING PLANS

All families are different. What works for one family may not work for another. Create a schedule and stick to it. The children have had their sense of permanence and consistency rocked. They need predictability and consistency.

DEMAND ACCOUNTABILITY

The court unfortunately must act like a “parent” to some parties. The judge is the only person who can demand accountability from them. Judges and attorneys need to remind the parties about what the court expects of them. Make them aware that: there should be no discussion of the case with the children; the children should be delivered promptly to the other parent; and they should not argue in front of the children.

If the divorce is successful, the children will remain close to both parents. The normal everyday activities, from helping the children with homework to tucking them in, will be provided by each parent during their custody period.

A good parent minimizes conflict with the other parent. A good parent shields the children from disagreements that arise. A good parent pursues stability and routine. This stability and routine should be the norm in both homes.

Once again, the parties are staring at each other. This time, it is with sadness and some regret. They know they gave it their best. Unfortunately, it did not work out as they hoped. With your help, however, they own their settlement. They sadly tell the court that the marriage irretrievably is broken. Their vows to safeguard the interests of their children, however, last forever. ■



Judge J. Stephen Schuster presides in the Superior Court of Cobb County, Marietta, Georgia. A special thanks to Amy Brooke Saul, Esq. and Spencer Gelernter, PhD., for their contributions to this article.

Landmark Benchbook on Substance Abuse is Now Available

While substance abuse and addiction are pervasive throughout the family court system, there are very few resources available for family law attorneys and members of the judiciary who want information specifically geared to parents and children in the family justice system.

In order to meet this need, the University of Baltimore School of Law Center for Families, Children and the Courts has published the *Benchbook on Substance Abuse and Addiction for Family Courts*. The long-awaited publication provides clear and concise information about the range of substance abuse and addiction issues affecting families and children in family courts.

To learn more, visit: <http://law.ubalt.edu/centers/cfcc/publications/index.cfm> or email cfcc@ubalt.edu.

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issues, not to aid counsel in his or her work with the client. Further, the therapist's work is confidential, and a breach or waiver of the privilege could lead to unintended consequences. A coach does not act as a therapist; rather, the coach can work directly with the client and counsel on developing techniques and providing information to help the client get through the divorce process. Because the coach is the attorney's consultant, the coach is covered under the work product doctrine. The coach, for example, helps the client articulate his or her fears, concerns, and needs. The coach also helps the client to communicate with the other spouse and children, assists in making judgment calls under the stress of the divorce, and instructs the client on techniques that are helpful in settlement conferences, depositions, hearings, and trials. The coach also provides feedback to counsel on how to work most effectively with the client.

USE A NEUTRAL EVALUATOR

The lawyer and/or the client sometimes become too invested in his or her desired outcome. While the attorney is dispassionate, he or she may not see the risks of proceeding or understand the other party's perspective. In other situations, settlement has stalled and nothing seems to break the log-jam. The creative juices stop flowing, with resentment, frustration, and anger rising to the surface.

An option to address this problem would be for the lawyers to jointly retain another lawyer with specialized knowledge and experience in an area (or a retired judge or an expert in a field that is the subject of the dispute). The neutral evaluator should be someone whom both lawyers know and trust. Each lawyer presents his or her "case" to the neutral evaluator, who, with an objective view and no stake in the outcome, provides input, including the case's strengths and weaknesses, the likely outcomes for each party, or settlement options. Armed with this insight, each lawyer can "re-group" with his or her client and approach a settlement with a different perspective.

CONSIDER USING FOUR-WAY MEETINGS

The use of four-way meetings, involving each litigant and attorney, is underutilized in litigation. Assuming that the parties are somewhat civil to each other, the power of such a meeting is immense. The four-way meetings also can be used for reasons other than settlement conferences, which typically occur late in the process. Four-way meetings can be used to agree on temporary orders, decide how information will be shared, brainstorm about acceptable options, or address a specific issue going to court.

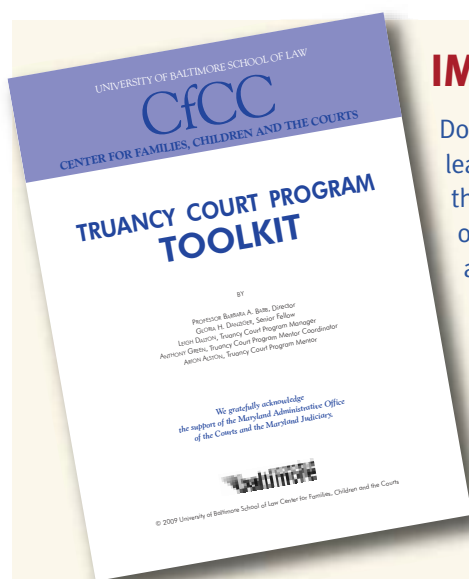
Four-way meetings are efficient. Information is shared immediately without letters, forms, or formal discovery, and questions can be addressed to avoid misunderstandings, mistakes, and the tedious process of time-consuming correspondence between the offices of the lawyers. The clients hear firsthand the ongoing progress of the case.

As Albert Einstein said: "Any fool can make things bigger, more complex, and more violent. It takes a touch of genius—and a lot of courage—to move in the opposite direction."

If we take the leap of faith and move in the opposite direction from litigation, and incorporate the best of what the alternative dispute resolution process offers, then we increase the possibility that we will have more satisfied clients and reasonable outcomes. ■



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To learn more, visit <http://law.ubalt.edu/centers/cfcc/publications/index.cfm> or email cfcc@ubalt.edu.

Domestic Violence Trials: Minimizing the Impact

BY RICHARD A. DEMICHELE, JR.

The Internet is seemingly littered with an endless number of scholarly texts 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.

Given the severe nature of domestic violence and the penalty associated with a conviction and its 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 a jury trial. Lawyers can get complacent when it is the judge and not a jury making the factual determinations. 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 usually is 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 procedures and rules of evidence can greatly enhance your client representation.

REPRESENTING THE ALLEGED DOMESTIC ABUSER

Minimizing the impact of domestic violence on children depends upon whom 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 parties’ home, a 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 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 not to have 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 a domestic violence case. While some alleged victims will choose to dismiss a temporary protective order on the eve of the hearing for a permanent protective order, it generally is better to proceed to trial and obtain a finding in favor of the alleged accused.

Obviously, if the alleged accused is found not to 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/she said” testimony. Preparing your client to testify and being well-versed in your state’s rules of evidence are critical to winning these types of cases.

In preparing your client to testify, it is important to anticipate the evidence that the accuser will present at trial. You should expect that the victim will rely on his or her testimony. Typically, the victim will be the first witness called to testify. Often, 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 the accuser may offer. If there was an altercation, there may be evidence, such as bloodied clothing, that is offered to support the testimony of the accuser. Preparing your client 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, 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 that otherwise would be inadmissible hearsay.

REPRESENTING THE ALLEGED VICTIM

If you are representing the alleged victim of domestic violence, most often he/she 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, usually will give the alleged victim primary physical custody of the children and either suspend or provide for 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 the people who come into regular contact with your children know that the alleged abuser is not allowed to pick up the children?**

on the Children Is Essential

- **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 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 victim's injuries**
- **Weapons or objects that were used to commit 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 jurisdiction's rules of evidence will be critical in having this type of evidence admitted at trial. 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 ensure the proper admission of your evidence.

READY RESOURCES

Clients who are victims of domestic violence often need more than just a lawyer in domestic violence court. Their ability to receive additional services that they need can affect the children, directly and indirectly. As a practical matter, you should be prepared to refer your client and the children to appropriate mental health professionals. These professionals can be a psychiatrist, a psychologist, a social worker, a counselor, or a therapist. Some clients will need a combination of these professionals and 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 victim, most cases are resolved by a trial. Mediation and other forms of alternative dispute resolution usually are 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 also is critical to prepare your client to tes-

tify on other matters. The client's credibility always is an issue. Discrepancies about seemingly trivial subjects may mushroom into significant questions of credibility for 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 up front can bolster credibility and minimize the impact of "bad facts."

YOUR CLIENT'S TESTIMONY: DIRECT AND CROSS

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

- **Testify in a slow and deliberate manner.**
- **Give specifics. Details tend to make a 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 his or her 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.**

The above is just a guide to prepare for the domestic violence trial. Obviously, 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. ■



Rick DeMichele is an experienced family law and domestic violence litigator in Haddon Heights, New Jersey. He is a national, state, and local bar leader who frequently presents at continuing legal education seminars.



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