Trial Process and Procedure

The Role of the Trial Judge in a Family Law Proceeding

The vast majority of family law matters are tried without a jury, so this book focuses on the application of the rules in trials where the judge is the trier of fact. In a typical family law case, the trial judge serves as the referee, settlement coach, fact finder, determiner of the applicable law, and overseer of all aspects of the dispute. The judge's role is expansive and substantial, and that role is referenced in various provisions of the rules of evidence. The trial judge must ensure that the proceedings are fair and orderly. For example, Federal Rule of Evidence (FRE) 611 requires the court to control the order and interrogation of witnesses. FRE 614 allows the court, on its own motion, to call and interrogate witnesses as necessary.

The rules of evidence are designed to ensure fair trials. Judges in bench trials must protect the integrity of the proceeding and efficiently manage it. Without application of the rules of evidence, a trial can rapidly become a brawl. By using the rules of relevance, the court can maintain order

and control over the evidence, limiting the case to germane and important information.

One could argue that the role of the trial judge in a family court proceeding is unique compared to judges in other civil and criminal proceedings. Because of the emotional subject matter and the nature of the proceedings, family court trial judges must be equal parts sage and babysitter. These judges must monitor and resolve disputes from the truly insignificant (division of the forks and knives) to the vitally important—custodial arrangements that will influence the futures of children. Not unlike other judges, however, the family court trial judge must act as a case manager: exploring settlement opportunities, determining the schedule for discovery, and adjudicating unresolved issues. Family court trial judges may not be able to solve all of the family's problems, but they must resolve those problems to the extent possible. Ultimately, it is the judge's foremost responsibility to see that justice is done for the litigants.

Trial judges possess great latitude with respect to their evidentiary rulings. And for the most part, appellate courts defer to the trial court's evidentiary rulings.[1] FRE 103 (a) specifically provides that "[A] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party." Not only must the error affect the substantial right of a party, but that party must also call the error to the attention of the judge so the judge can correct the mistake.[2] The lawyer must successfully offer or defend evidence in the trial court, as there will not likely be a second chance in the appellate court.

1. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750 (1946).
2. Fed. R. Evid. 103(a)(1). Preservation of error is discussed in detail in Chapter 15.

Format of a Family Law Trial

Some lawyers do not try matrimonial cases as they would an ordinary civil case. The rules become relaxed. They waive their opening statement. They do not conduct examinations of witnesses in an orderly fashion. These lawyers do not properly prepare witnesses and are often unprepared themselves. The trial proceeds haphazardly. This is not the way to handle a family law matter.

If lawyers do not take family law matters seriously, neither will litigants nor the public. Rulings concerning children profoundly affect their welfare, both short and long term. Children certainly deserve the same attention that a commercial case commands. Lawmakers codified the Federal Rules of Evidence and the Federal Rules of Civil Procedure because they recognized that clearly defined rules produce more just results. Lawyers need to learn and apply trial advocacy skills in family court with the same earnestness as trial lawyers in other courts. Family lawyers should not define themselves as highly paid brawlers; rather, they should be skilled advocates using the rules and art of advocacy. There are many resources to help family lawyers refine their trial skills, including the American Bar Association's Family Law Trial Advocacy Institute, presented annually.[3] In the remainder of this chapter, I briefly review the specific components of a family law trial.

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3. 27th Annual Family Law Trial Advocacy Institute (ABA/NITA) <http://www2.americanbar.org/calendar/aba-section-of-family-law-advanced-trial-advocacy-institute-held-jointly-with-nita/Pages/default.aspx>; National Institute for Trial Advocacy <http://www.nita.org/>;

Gallagher Law Library, University of Washington School of Law, Trial Advocacy Resources <http://lib.law.washington.edu/ref/trialad.html>

Theories and Themes

Understanding the theory of your case is the starting point for all matters that proceed to a trial or hearing. A case theory is "the adaptation of a factual story to the legal issues in the case. Your theory must contain a simple, logical, provable account of facts which, when viewed in light of the controlling law, will lead to the conclusion that your client should win."[4] What facts, applied to the existing law, warrant the relief you seek?

The theory is the skeleton of the case. What are the particular facts supporting a claim for alimony? Why should the court award custody of the children to your client? Was she the primary caretaker of the children, who have thrived in her care? Again, the theory is the facts as applied to the law that supports the desired result. The theme, on the other hand, is the persuasive basis for why the theory should prevail.

The theme is a short statement designed to grab the judge's attention with a moral hook on which the relief should be granted. A theme appeals to common values and cultural beliefs. A good theme artfully encapsulates the core principle of the case with a phrase or parable that will resonate with the judge. The theme is not designed to appeal to judges' logic, but rather their sentiments. Neuroscience proves that decision makers rely (often unconsciously) on feelings more than on reason. If advocates can associate the client's cause with a powerful phrase, story, or cultural reference, they are on their way to a successful result.

Literary archetypes are useful sources. For example, if the issue involves one party's disciplined money management contrasted against the spouse's frivolous spending, an appropriate theme might reference Aesop's "Ant and the Grasshopper" fable. Or, more simplistically, perhaps the theme could be "givers and takers." If a

4. Steven Lubet, Modern Trial Advocacy 380 (4th ed. 2009).

theory is the basis for the relief, the theme is the reason why your requested relief is the righteous thing for the judge to do. In biological terms, if the theory is the skeleton, the theme is the pumping heart of your case.

Thread the theme throughout the entire hearing or trial. Reference it in the opening statement, in the closing argument, and at all times in between. Use the language from your theme when you question witnesses. Repetition is powerful: regular references to your theory and theme make for a more effective presentation.

Opening Statement

Regrettably, many trial judges and family law attorneys dismiss the necessity of an opening statement. In all fairness, when judges nurse a particular case from file to trial, they may not think they need a road map to start the trial. But framing the issues and the evidence is always helpful, if for no other reason than to give the court the context before the evidence is presented. From the lawyers' perspective, the opening statement is vital. It is their first opportunity to advocate for their client: to identify the primary facts, issues, and theories and to tie them together with a compelling thematic thread.

First impressions stick, and the opening statement gives the court a background against which to better understand the evidence when it ultimately is offered. For a court to determine materiality and relevance, it must have a context, and the opening statement provides that context. While the opening statement must be free from argument, one can nevertheless persuade by effectively organizing the facts. The opening statement is a vital opportunity for lawyers to focus the dialogue on their theory and theme, directing the court's attention in favor of their client. Never waive an opening statement.

Tell a story in the opening statement. Stories are the most effective way to persuade. I personally start the opening statement with the theme, referencing a parable, simple story, or hook phrase: "Your honor, this case is about givers and takers," for example. From there, I summarize the issues that need to be resolved. Next, I state the salient facts in a story format, trying to sequence them in the most logical and persuasive way. There are no rules requiring a chronological presentation of the facts, as long as the facts make sense in the overall scheme of the case. Confront any problems with the case as well. Discussing your weaknesses softens their impact, so preemptively explain issues of concern. I conclude by summarizing what the client will be requesting and then provide a final reference back to the theme. Repetition is a fundamental principle of effective trial advocacy.

Direct Examination

Direct examination is one of the most underrated trial advocacy skills. Lawyers rarely devote enough time to preparing their clients for their direct examination, despite the fact that the client is usually the most important witness in the case. Seminars abound on effective cross-examination, but few instructors spend much energy on direct examination. Conducting an effective direct examination of a witness is more challenging than a cross-examination. On cross, the lawyer, through properly phrased questions, has total control over the testimony. Direct examination cedes control to the witness. In a divorce case, when the underlying subject matter is often emotionally compelling, direct examination is vital to a successful result. Have clients tell their stories, and make them interesting.

Gold-Bikin and Kolodny, in their book, *The Divorce Trial Manual*, describe the fundamentals of an effective direct examination:

> The keys to an effective direct examination are well-planned, nonleading open-ended questions. The questions will begin with the "w" words—*who, why, what, where, when*—and the "h" word, *how*. Occasionally, a question may begin with "Describe." These words allow the witness to do the talking.[5]

Leading your witness on direct is unproductive and often ineffective. It is the witness's own words that will move the judge, not the lawyer's partisan "testimony" through leading questions.

Direct examination serves two purposes. First, as mentioned above, direct examination gives witnesses an opportunity to tell their story. Second, direct examination lays the foundation for important evidence. One needs to authenticate documents, photographs, and other tangible exhibits as a prerequisite to their admission, and direct testimony by a witness is the most common method of doing so.[6] Do not treat direct examination as an afterthought. Thorough preparation is necessary for an effective result.

Cross-Examination

If direct examination is the stepchild of trial advocacy, cross-examination must be the golden child; most people think it generates the most excitement in any trial. Fictionalized lawyers regularly achieve some winning insight during cross-examination. But as most practicing lawyers know, dramatic "gotchas" rarely happen in real life. Cross-examination actually serves the mundane purpose of accumulating evidence that supports the theory or the theme. Home runs rarely happen during cross-examination; the important thing is to get on base.

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5. Lynne Z. Gold-Bikin & Stephen Kolodny, The Divorce Trial Manual: From Initial Interview to Closing Argument 59 (ABA ed., 2004).
6. I address the topics of foundation and authentication in Chapter 9.

A focused cross-examination may achieve some or all of the following objectives:

- To impeach the testimony of an adverse witness
- To impugn the credibility of a particular witness, particularly an expert witness testifying on behalf of an opponent
- To challenge the observations or conclusions of an adverse witness
- To acquire facts or admissions to support the theory and the theme of the case
- To lay a foundation or authenticate a document or other item of tangible evidence

Plan the cross examination in advance and make sure it is goal oriented. Reactive battering of an adverse witness wastes time and is often dangerous. While many clients love seeing righteous indignation by their lawyer, not every witness warrants this treatment. And when the judge sees a witness treated unfairly, the lawyer risks alienating the judge. Cross-examination is not for your client's entertainment; it is to help win the case.

Cross-examination does not need to be cross to be effective. Identify your precise goals prior to cross-examination and methodically set out to achieve them. Law schools and trial advocacy clinics may teach the principles of cross-examination, but the only real way to become an effective cross-examiner is by actually trying cases and examining witnesses. Law students are taught never to ask a question if they do not already know the answer. This is a good rule, but in practice, a calculated risk is sometimes appropriate. A trial lawyer's instinct is honed through practice and experience. And it is this instinct that makes a great cross-examiner.

Control of the witness is vital. The best way to do this is by asking tight leading questions and maintaining eye contact. Most witnesses want to tell *their* story, and the examiner must make sure

that they are denied the opportunity to do so. Ask precise questions that advance the theory and theme. Address only one fact per question. A wily witness will exploit any ambiguity in the question. Avoid adverbs—they are deadly. A witness will toy with questions that include words like *slowly* or *quickly*. Likewise, certain adjectives allow for hedging and invite problems: "Wasn't she a good mom?" Adverbs and adjectives allow the witness to qualify their answer. They should be avoided.

Closing Argument

Closing argument is where all the pieces are put together; it is where everything should make sense to the judge. The opening provides the context and tells judges what they are going to hear, the trial tells the story, and the closing ties it all up. Repetition is a powerful ally in the courtroom. Unlike the opening statement, the closing is the place where lawyers can argue the significance of the evidence, emphasizing their clients' strengths and the opponents' weaknesses. Lawyers can also address the application of the facts to the law at this time.

Each lawyer's style is different—some are thespians and others are accountants. The important thing is to recount the evidence in a way that resonates with the judge. Gold-Bikin and Kolodny outline the elements of a successful closing argument:

- Follow a logical sequence.
- Reiterate the theory and the theme.
- Use introduced exhibits.
- Raise rhetorical questions.
- Use analogies.
- Argue the proven facts, not counsel's opinions.
- Argue strengths.

- Explain weaknesses.
- Be cogent, concise, and clear.
- Keep it short, make the point, and sit down.
- Speak without notes.7

Lawyers should consider these guidelines when preparing for closing argument. It is the last word. And it must be potent.

Ethical Considerations

Lawyers are officers of the court. We have an ethical duty to the court to behave in a manner befitting our education and influence in society. The passionate nature of the proceedings sometimes invites unscrupulousness, but we must remember to keep those impulses in check. Rule 3.3 of the ABA Model Rules of Professional Conduct provides:

(a) A lawyer shall not knowingly:
  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to

7. Lynne Z. Gold-Bikin & Stephen Kolodny, *supra* note 5 at 42.

> the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.[8]

The Model Rules of Professional Conduct are not aspirational: they *require* us to behave appropriately.

Family law litigation can be brutal, and the level of competition between the lawyer combatants is oftentimes ferocious. Litigants sometimes become emotionally disabled or become unable to function because of their situation. They make demands that we must sometimes refuse. Some lawyers want to please their client at all costs, but they need to know when to draw the line. Trial lawyers by temperament and wiring love to win; but winning at all costs impugns the system and corrodes the lawyer's soul. Playing by the rules maintains the integrity of the system and, frankly, our lives. No client is worth compromising your integrity.

8. Model Rules of Professional Conduct Rule 3.3 (2010).