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Family Law

Perfecting Your Role as Attorney

How to effectively analyze and present your case

By Robert J. Durst II

It is inevitable that virtually every divorce attorney will, from time to time, lose sight of their role as an attorney — charged with the fiduciary responsibility of analyzing the facts, applying the facts to the law, communicating the facts and law to their adversary or the court — and will slip into another role which will almost always minimize their effectiveness.

It is, perhaps, the very personal relationship of a divorce attorney and their client which often diverts counsel's focus away from their role as an attorney and misguides them into inappropriate roles.

For example, it is natural that divorce attorneys often assume the role of being simply an alter ego for their client. They begin to think, act and simply articulate the positions of the client.

It is likewise avoidable, but unfortunate, that divorce attorneys often become combatants with their adversaries. Their effectiveness (and even in some instances, the client's best interest

Durst is the chairperson of the divorce group at Stark & Stark of Lawrenceville.

and needs) becomes lost in a fray between two sometimes competent but over-zealous attorneys.

Equally unfortunate, but understandable because of the very personal nature of the divorce attorney/client relationship, divorce attorneys often slip into the role of becoming a friend or confidant of their client.

Finally, while collegiality with counsel and respect for the judiciary should be the cornerstone of our professionalism, many divorce attorneys allow their relationship with their adversary and/or the court to compromise their responsibilities to the client. It is not uncommon to hear an attorney respond to a request for an adjournment to the effect that they themselves would certainly have no objection, but the client objects. Or the attorney may explain to a judge that it is the client, not the attorney, who is reluctant to settle the case. Or, an attorney may even argue that the certification is the client's, but not necessarily the attorney's, version of the facts. Such misguided relationships with the client, your adversary or the court should and can be avoided by simply focusing upon our role as lawyers.

All of those transformations adversely impact an attorney's effectiveness, whose role is to analyze the facts, apply the law, and communicate

the law and the facts to the adversary and the court in a way that obtains appropriate legal remedies and redress for the client.

Taken individually, the attorney's responsibilities are as follows:

Gathering the facts. A competent attorney will take the time to discuss his client's factual allegations in detail and on more than one occasion. Those facts which relate to outcome-determinative issues should be reviewed on multiple occasions with the client. Variations in the client's recitation of the facts, gaps in the client's factual presentation and implausible assertions should be critically analyzed and resolved or, if they cannot be resolved, discarded by the attorney.

To the extent possible, important facts should be corroborated by independent testimony or document.

Analyzing evidentiality. Facts that cannot be converted into admissible evidence simply do not exist within the context of a legal proceeding.

Therefore, it is incumbent upon counsel to not only garner the facts, but to make an analysis as to whether the facts are properly admissible. If they are not admissible, counsel must determine if there is another source of proof. If not, they must modify their case accordingly.

During the period of preparation

and pendency of the action, properly admissible and marked documents should be gathered, a motion in limine should be filed to bar adverse counsel's proffer of inadmissible facts, alternative means of proof, the issuance of subpoenas, taking of de bene esse depositions or, in appropriate circumstances, even taking the videotaped deposition should be concluded.

Competent counsel cannot wait until the eve of trial to proffer inadmissible evidence or documents. In the age of video conferencing and videotaping depositions, no witness, expert or otherwise, should be considered unavailable nor should trial be unnecessarily delayed as a result of any witnesses' scheduling conflict.

Changing the lemons to lemonade. Every case is replete with helpful and adverse facts.

Counsel should prepare a listing of those facts that are adverse to his and/or the client's position and those that are favorable. Effective preparation must include explaining, mitigating or otherwise defusing the adverse facts (i.e., turning the lemons into lemonade).

Case law. Counsel should research the relevant case law on each outcome determinative issue.

Read the relevant cases. Do not simply rely upon your recollection of the case.

Analyze the cases from the perspective of which comparative facts make them more or less analogous to your position and, also, with an eye toward what arguments opposing counsel will make in an effort to distinguish cases favorable to your position. Cite check the cases you have read to see if there are more recent holdings and/or cases in which the principle you are seeking to enunciate have been followed by other courts.

Seek out and be ready to quote in your legal memorandum, argument or letter brief the "quotable quotes" from those cases which support your position. Look for language of the Appellate panel or Supreme Court to the effect that "it goes without saying," it is axiomatic, our

law has long held, and similar references which add weight and credence to the position which you are citing.

The statutes. Every issue in a matrimonial case is, to a significant extent, governed by statutory law.

Our statutes set forth specific factors and our case law directs our trial judges to make specific findings and conclusions of law on every factor relevant to alimony, child support, equitable distribution and parenting. As you read the statutory factors, create either computer cabinets, notes or notebooks which garner and index the facts and evidence which support your client's position by any of the statutory factors.

For example, if the forbearance from career goals is a relevant fact in your case:

A. Compile a history of the family needs to show that your client was a "trailing spouse;" or

B. Index the relevant deposition testimony for both your client and her/his spouse, or

C. Copy, index and include relevant answers to interrogatories or, not to be overlooked, craft, serve and then compile a detailed demand for admissions in your case.

Name your case. During its pendency, virtually every case will take on a name, the law clerks and even counsel will begin to refer to the case as "_____ case." The case with "cash in a safe," the case with the "broken nose," the case with the "\$50,000/month budget," whatever. In the development of your case and its strategy, you select and develop that name. When you call the court or your adversary, refer to the case by your name. Appropriately done, the name you have created will set the tone for the case and will emphasize your theme of the case.

The art of storytelling. All trial lawyers are "storytellers." Divorce lawyers are "storytellers." We communicate or "tell the story" of a client's case to a mediator, arbitrator, early settlement panel or trial judge.

The "story" we tell cannot be fiction. It must be supported by the facts

and law, but it must be told in a fashion which captures the attention of the listener. The art of being a truly good lawyer is almost entirely dependant upon effective communication.

Some of the critical components of effective communication are:

Choose your words carefully. Descriptive words permit a listener to draw conclusions above and beyond the words themselves. The connotation of the words you choose must be consistent with your theme of the case, but the connotation often says more than the words themselves.

Use visual aides. A picture is worth a thousand words — in fact, a thousand and six words.

Evidence Rule 1006 is the trial attorney's "best friend." Through Rule 1006, you can develop charts, graphs and summaries of the evidence which are in and of themselves evidential. Charts, graphs or summaries of evidence properly prepared and presented in accordance with Rule 1006 are not simply writings on the white board or easel. They are evidential, are admitted into evidence and are considered as evidence by the finder of fact. An organized, descriptive chart which shows the flow of funds into and out of an account, discrepancies in the parties' incomes, the levels of percentages of expenses, or other detailed information is far more persuasive than hours of tedious, boring and dry testimony whether from a lay witness or an expert.

Use timing effectively. Timing is the punctuation marks of storytelling. Every good communicator times their communication to allow the hearer to assimilate what is being said and holds their punch lines to the conclusion. A loud, aggressive, tedious, ad hominem or unnecessarily detailed presentation is not synonymous with an effective presentation. In fact, more often than not, to the contrary.

The art of communicating is an acquired skill. Attorneys who have not yet developed that skill should observe senior attorneys who have mastered their trade.

Listen to skilled communicators

such as Maya Angelou, Paul Harvey or Garrison Keillor. Observe comedians such as Jerry Seinfeld, Bob Newhart or Jonathan Winters. All of those persons have learned the art of word choice and timing. Garrison Keillor can take you to the shores of Lake Wobegone and make you smell the

pine trees. Strive to emulate that art form while developing your own style.

In conclusion, the skill of effectively analyzing and presenting your case is the result of:

1) Understanding and remaining true to your word as your client's attorney;

2) Assiduously developing the facts of your case;

3) Researching and understanding the law relevant to the issues of your case; and

4) Effectively communicating all of that to either adverse counsel in settlement negotiations and/or to the decision maker. ■